Petition

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No. . . .

IN THE

Supreme Court of the United States

October Term, 1981

SUE GOTTFRIED, individually, and on behalf of the deaf and hearing impaired population within the stations' viewing area, and GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC.,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

NATIONAL BROADCASTING COMPANY, INC.; METROMEDIA, INC.; AMERICAN BROADCASTING COMPANIES, INC.; KCOP TELEVISION, INC.; RKO GENERAL, INC.; GOLDEN WEST BROADCASTERS, AND CBS, INC.,

Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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Questions Presented.

This petition involves the affirmance by the United States Court of Appeals for the District of Columbia Circuit of a denial by the Federal Communications Commission (FCC or Commission) of a petition to deny license renewals to seven Los Angeles commercial television stations. The issues arise under § 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination against "otherwise qualified" handicapped persons by recipients of federal financial assistance. The Commission concluded that commercial broadcasters are not recipients of federal financial assistance within the meaning of § 504. Accordingly, the Commission rejected the petition to deny license renewals to commercial broadcasters, without inquiring into their efforts to comply with § 504. The court affirmed the Commission's action with regard to the commercial broadcasters. At the same time, however, the court held that public television stations are bound by § 504 and concluded that the Commission could not find the service of such stations to be adequate to justify renewal under the public interest standard of the Communications Act without at least inquiring specifically into their efforts to meet the programming needs of the hearing impaired. Accordingly, the court held that the challenge to the license renewal of public station KCET-TV must be remanded to the Commission for further proceedings. Community Television of Southern California has filed a petition for a writ of certiorari, requesting this Court to review the lower court's decision, as it applies to KCET-TV. By this petition, petitioners ask the Court to review the decision of the court below as it applies to the commercial broadcasters.

The questions thus presented are:

1. Whether the Federal Communications Commission grants commercial broadcast licensees "federal financial assistance" when:

[A] The Commission gives commercial broadcasters, in the form of broadcast licenses, the free use of a limited and valuable part of the public domain;

[B] Commercial broadcast licensees are free, in effect, to sell the licenses given without charge, without returning to the government the fair market value of the license;

[C] Commercial broadcast licensees receive the services or of federal personnel, free of charge.

2. Whether the court below erred in affirming the FCC finding that the service of the seven commercial broadcasters was adequate to justify renewal in the public interest without at least inquiring specifically into their efforts to meet the programming needs of the hearing impaired, in light of § 504.

List of Parties.

The following is a list of all parties that appeared before the court whose judgment is sought to be reviewed: Sue Gottfried, individually, and on behalf of the deaf and hearing impaired population within the stations' viewing area; Greater Los Angeles Council on Deafness, Inc.; Federal Communications Commission; KABC-TV, American Broadcasting Companies, Inc.; KCOP-TV, KCOP Television, Inc.; KHJ-TV, RKO General, Inc.; KNBC-TV, National Broadcasting Co., Inc.; KNXT-TV, CBS, Inc.; KTLA-TV, Golden West Broadcasters; KTTV-TV, Metromedia, Inc.; and KCET-TV, licensed to Community Television of Southern California.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Petitioners, Sue Gottfried and Greater Los Angeles Council on Deafness, Inc., respectfully pray that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 17, 1981.

OPINIONS BELOW.

The opinion of the Court of Appeals for the District of Columbia, not yet reported, is reprinted in Appendix A, pp. 1a-40a. The court vacated and remanded for further proceedings those portions of orders and opinions concerning public broadcasters but affirmed those portions of orders and opinions of the Commission concerning license renewal applications of seven commercial television stations in Los Angeles. The FCC's orders and opinions are reported at 69 F.C.C.2d 451 (1978), recon. denied, 72 F.C.C.2D 273 (1979), reprinted in Appendix B, pp. 41a-67a.

JURISDICTION.

The opinion and judgment of the Court of Appeals was entered on April 17, 1981. The public television station (KCET-TV) and the FCC filed timely petitions for rehearing and suggestions for rehearing *en banc*. Said petitions were denied on July 8, 1981. A copy of said denial is set forth as Appendix C, pp. 69a-72a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, and § 309 of the Communications Act of 1934, 47 U.S.C.§ 309, as amended, appear in Appendix D, pp. 73a-78a.

STATEMENT OF THE CASE.

Petitioner Gottfried is a hearing impaired member of the Los Angeles community. The Greater Los Angeles Council on Deafness, Inc. (GLAD) is an umbrella group of organizations in Los Angeles with significant hearing impaired constituencies. On October 28, 1977, on behalf of the deaf and hearing impaired population of the Los Angeles market, petitioners filed petitions to deny the license renewal ap-

plications of seven commercial Los Angeles television stations, and one Los Angeles public television station. In their petitions pertaining to the seven commercial licensees petitioners alleged generally that the stations had failed to ascertain or to meet the needs of the hearing impaired. They further argued that the stations, as recipients of federal financial assistance, had failed to satisfy obligations imposed on them by § 504 of the Rehabilitation Act.

On September 8, 1978, the Commission denied the petitions to deny license renewal to the eight stations. The Commission stated that the petitions had "failed to allege specific facts which raised any substantial or material question as to whether a grant of the renewal applications . . . would serve the public interest, convenience, and necessity." The Commission asserted that § 504 did not apply to the commercial licensees and denied that a petitioner could raise a "substantial or material" renewal question merely by alleging non-compliance with the Rehabilitation Act or the national policy expressed by that statute.

Petitioners responded to the Commission's order by filing a petition for reconsideration alleging, *inter alia*, that the Commission was obliged to issue a § 504 regulation, pursuant to Executive Order No. 11914 (41 Fed.Reg. 1787) and the HEW guideline regulation promulgated pursuant to said Executive Order (45 C.F.R. § 85). The Commission rejected this contention and dismissed the petition for reconsideration as failing to present a substantial and material question of fact requiring further hearings. The Commission held that because the petitioners had not effectively challenged the stations' compliance with stated FCC requirements, they had not raised a substantial claim that the licensees' service had failed to satisfy the statutory requirement of being in the public interest.

Pursuant to § 402 of the Communications Act, 47 U.S.C. § 402, petitioners appealed the decision of the Commission to the Court of Appeals for the District of Columbia Circuit. The Court held that § 504 does not directly impose any enforcement obligation on the FCC, because it allegedly is not empowered to grant federal financial assistance. The court also concluded that although a license to broadcast is a "commodity of great value" (A.29a), Congress did not intend for such licenses to be considered federal financial assistance and hence commercial broadcasters have no obligation to comply with the provisions of § 504. In upholding the Commission's action pertaining to the commercial broadcasters, the court stated that it was deferring to the Commission's judgment because the Commission has a range of discretion in assessing what commercial stations must do in the public interest.

REASONS FOR GRANTING THE WRIT.

Section 504 of the Rehabilitation Act — the civil rights act for handicapped persons — has been trumpeted as one of the most important pieces of legislation in our history. Senator Cranston, speaking on the 1978 Amendment to § 504, stated (Cong. Rec., 95th Cong., 2d Sess. Vol. 124, pg. 12147): "Mr. President, there is a great new civil rights struggle going on in our country. Long neglected Americans are seeking, with good reason, their full and equal share of the rights to which all are entitled in our land. Accessibility for handicapped individuals must be viewed in that context — it is an issue of civil and human rights. I believe strongly that we must assure that the rights and opportunities accorded every other American are accorded to handicapped Americans." The avowed goal of § 504 is to open a new world of equal opportunity for more than 35 million handicapped persons — the blind, the deaf, persons confined to

wheelchairs, the mentally ill or retarded, and those with other handicaps. 42 Fed.Reg. 22676.

Petitioners here represent the deaf population that has largely been excluded from the electronic mass media since the invention of the telephone. The primacy of such media as radio and television in modern America have served further to isolate the large number of our hearing impaired citizens. Although television has the potential to restore the deaf to a mainstream position in popular media, this possibility has largely been ignored. Thus despite lip-service by the FCC since 1970,[1] shifting among policy statement, rulemaking and adjudication, and notwithstanding the enactment of the Rehabilitation Act, the Commission still refuses to scrutinize a commercial broadcaster's discrimination against the deaf. Petitioners submit that the court of appeals erred by refusing to require such scrutiny at license renewal time.

I.

COMMERCIAL BROADCASTERS RECEIVE FEDERAL FINANCIAL ASSISTANCE WITHIN THE MEANING OF SECTION 504 AND THE CONTROLLING HEW REGULATION.

Initially, petitioners emphasize that § 504 is a civil rights statute designed to remedy long-lasting and deep discrimination against a powerless minority. Such statutes are accorded a sweep as broad as their language permits. *Griffin v. Breckenridge*, 403 U.S. 88, 98; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437; *United States v. Price*, 383 U.S. 787, 801. The interpretation of the statute by HEW — the lead agency — must also be considered and given great weight. *Udall v. Tallman*, 380 U.S. 1, 16-18.

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[1] See Deaf Viewers — Use of TV to Inform, 26 F.C.C.2d 917 (1970).

On April 29, 1976, President Ford issued Executive Order No. 11914 (41 Fed.Reg. 1787) naming HEW as the lead agency for implementing § 504. In June 1977, HEW issued regulations applicable to recipients of federal financial assistance from HEW (45 C.F.R. § 84) and in January 1978 HEW issued its guideline regulation to assist other federal agencies in complying with § 504. (45 C.F.R. § 85). When the Secretary of HEW issued his regulation in 1977 he sent to each member of Congress the regulation as issued asking each member to instruct him as to whether he exceeded or had fallen short of legislative intent. Thereafter, § 504 was amended in 1978 without any suggestion that the regulation did not accurately reflect statutory objectives. The HEW regulation interpreting § 504 is, therefore, entitled to particular deference, not only because HEW's interpretation involves issues of considerable public importance, but also because Congress has not acted to correct any misperception of its statutory objectives. *United States v. Rutherford*, 442 U.S. 544, 554; *CBS, Inc. v. FCC*, 101 S.Ct. 2813, 2823. Congressional failure to repeal an agency interpretation has long been recognized as indicative of congressional acquiescence in the agency interpretation. *Commissioner v. Noel Estate*, 380 U.S. 678, 681-682; *Zemel v. Ruck*, 381 U.S. 1, 11-12.

HEW defines federal financial assistance as follows:

> " 'Federal financial assistance' means any grant, loan, contract . . ., or any other arrangement by which [Government] provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel; or (3) Real and personal property or any interest in or use of such property, including: (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and (ii) Proceeds from a subsequent transfer or lease of such

property if the Federal share of its fair market value is not returned to the Federal government." (45 C.F.R. §§ 84.3(h) & 85.3(e)).

A. The Commission Grants Federal Financial Assistance When It Gives to Commercial Broadcasters the Free and Exclusive Use of a Limited and Valuable Part of the Public Domain.

In *CBS, Inc. v. FCC*, 101 S.Ct. 2813, 2829, this Court stated:

> "A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.' *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966)." See also, *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (Chief Justice Burger).

In *Columbia Broadcasting Systems, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 174 n. 5, Justice Brennan stated that a free license is functionally equivalent to "Government subsidization of broadcasters."

The Commission has itself noted the value of the broadcast license it gives free of charge:

> "The radio frequency spectrum is a scarce and valuable natural resource. Users of the spectrum must obtain a license from the Commission to operate, just as individuals and companies who wish to drill for oil and gas, mine coal, or graze cattle and sheep, must obtain permission from a federal agency before they can gain access to federal lands. Competitive bidding has been used in the leasing of offshore oil and gas rights in order to obtain a 'fair market value' for the use of that scarce resource. It is obvious that the spectrum is just as necessary to radio communications as crude oil is to gasoline production and land is to coal mining, cattle

grazing and timber growing." (Notice of Inquiry: Free Refunds and Future FCC Fees, 69 FCC 2d 741, 768).

Oil Companies, coal mining companies, cattle grazers and timber growers all pay the government for the use of federal property. Commercial broadcasters do not.

The franchise given to commercial broadcasters for free constitutes "property" within the meaning of § 504 and the HEW regulation. As this Court stated in *Board of Regents v. Roth*, 408 U.S. 564, 571, property rights can be redefined from generation to generation:

> " 'Liberty' and 'property' . . . are among the [g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this nation knew too well that only a stagnant society remains unchanged."
> See also *Goldberg v. Kelly*, 397 U.S. 254, 261; *Perry v. Sinderman*, 408 U.S. 593.

A commercial broadcaster not only receives its license for three years, but additionally, the broadcaster can expect that its license will be renewed. *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 61 (D.C. Cir. 1978), *cert. den.* 99 S.Ct. 2189.

This Court has stamped its approval on this renewal expectancy:

> "[P]reserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proved broadcast service to the public, and in its indirect consequence of rewarding - and avoiding losses to - licensees who have invested the money and effort necessary to produce quality performance. Thus, *although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both*

> *the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause.'' FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 805. [Emphasis added]

Even the use of a broadcast license for a limited three year period would be "any interest in use of . . . property," bringing it within the HEW definition of federal financial assistance. But the judicially approved "legitimate renewal expectancy" expands this property interest substantially.

The court below acknowledged that "a license to broadcast on the public airwaves is a commodity of great value." (A. 29a). In footnote 55, the court noted that as long ago as 1964 the average value of a VHF license probably exceeded $1,500,000. The court stated: "That figure was based on calculations of the difference between the sale price of stations actually sold and the replacement cost of the stations' material facilities. Whatever the actual figure, there can be no doubt that the broadcast licenses contested in this case possess great value. In the Los Angeles market, which comprises approximately 10 million people, the FCC grants only 13 commercial licenses to television stations. And Los Angeles is the most profitable market in the country."

Petitioners find it difficult to conceive of this "federal financial assistance" not bringing commercial broadcasters within § 504.

B. Commercial Broadcasters Receive Federal Financial Assistance Within the Meaning of § 504 Because They Can, in Effect, Sell the License Granted to Them Free of Charge, Without Returning to the Federal Government the Fair Market Value of the License.

The reality of broadcast ownership is that a licensee receives a valuable property for free which, "after a decent interval, he may dispose of . . . and in fact, if not in law, sell the grant which the FCC gave him for nothing." Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 J.of L. and Econ. 161, 165 (1965). Although licensees cannot sell their licenses without FCC permission, 47 U.S.C. § 309 (h), they are readily transferable on the open market. The July 27, 1981 issue of *Broadcasting* reports that Metromedia, Inc. bought WCVB-TV Boston for $220,000,000 — "the highest price ever paid . . . for a single station broadcast property." The magazine reported: "[T]he price represents a windfall for the stockholders of Boston Broadcasters, Inc. That company got the [channel] essentially for legal fees of about $2,000,000 when the FCC ordered [the prior owner] off the air." *Broadcasting* states that "thirty-seven of the 225 stockholders stand to become instant millionaires after picking up $1,300 for each share of their stock."(*Id.* at 27).

Professor Coase has referred to the right of a commercial broadcaster to sell the grant which the FCC gave for nothing as "an anti-poverty campaign for millionaires." Coase, *supra*. at 165. However it may be labeled, it is plainly federal financial assistance. *McGlotten v. Connally*, 338 F.Supp. 448, 461-462 (D.C. Cir. 1972).

C. Commercial Broadcast Licensees Receive the Services of Federal Personnel, Free of Charge. This Constitutes Federal Financial Assistance Within the Meaning of § 504.

For over four years, the FCC has provided all kinds of services to broadcast licensees without repayment. As § 504 applies to recipients of federal financial assistance, and one form of federal financial assistance is providing the "[s]ervices of federal personnel," § 504 should apply to broadcast licensees.

Congress, the courts and the FCC itself have recognized that the FCC provides the kind of services for which it should charge fees. The Independent Offices Appropriations Act of 1972, Tit. 5, 65 Stat. 290, 31 U.S.C. § 483(a), authorizes federal agencies to impose fees on all beneficiaries of "any work, service . . . benefit, . . . license, . . . or similar thing of value or utility performed, furnished, provided, granted . . . by any federal agency." Congress' intent that the Act encompass many FCC activities is made clear in the Senate Report which led to the passage of the Act. It pointed out that the FCC "renders a tremendous variety of services, a substantial number of which would lend themselves to equitable fees." (S.Rep. No. 2120 at 4, 81st Cong., 2d Sess. (1950)). The report listed a number of FCC services appropriate for fee assessment: "radio station construction permits, radio station operating licenses and renewals, authorization of assignment of transfer of licenses, and certificates of public convenience and necessity." *FPC v. New England Power Co.*, 415 U.S. 345, 355 (opinion of Marshall, J.); see S.Rep. 2120 *supra*. at 11.

In *National Cable Television Ass'n v. United States*, 415 U.S. 336, the Court narrowly construed the Appropriations Act, but confirmed the FCC's authority to impose fees on

broadcast licensees. It declared that a federal agency could exact fees "for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society." *Id.* at 340-41.

The FCC suspended collecting all license fees on January 1, 1977. See *Notice of Inquiry: Fee Refunds and Future FCC Fees*, 69 FCC 2d 741 (1978) [hereafter *"First Notice: Fees"*]. It then initiated its inquiry into formulating a new fee schedule, *id.*, but has yet to promulgate a new schedule, or revoke its suspension of fees. See, *Second Report and Order, Fee Refunds and Future FCC Fees*, 45 Fed.Reg. 62072 (September 18, 1980); *Second Notice of Inquiry: Fee Refunds and Future Fees*, 73 FCC 2d 4 (1979); *Fee Suspension, Clarification*, 42 Fed.Reg. 3169 (January 17, 1977) ("Our intention was, and is, that until further notice, no fees are to be submitted to the Commission after January 1, 1977 - without exception."). The Commission recognizes that its failure to collect fees amounts to a subsidy: "Failure to recover all reimbursable costs is tantamount to forcing taxpayers to subsidize those firms and their customers who are engaged in the production, sale and consumption of telecommunications services. Such subsidies may not be legal, necessary, equitable, economically efficient or in the public interest." *First Notice: Fees, supra* at 758. Still, the plain fact is that for over four years the FCC has not collected *any* "reimbursable costs", and the taxpayers have continued to subsidize the broadcast industry.

Because the FCC has donated its services for over four years, thereby subsidizing commercial licensees, it has provided them federal financial assistance, and is required to issue section 504 regulations in accordance with Executive Order No. 11914 (41 Fed.Reg. 1787). Commercial broadcasters, as recipients of this subsidy, have obligations under § 504. See, *CBS, Inc. v. FCC, supra* 101 S.Ct. at 2829.

D. The Court Below Improperly Concluded That Commercial Broadcasters Are Not Recipients of Federal Financial Assistance Within the Meaning of § 504.

As already noted, the court below acknowledged that "a license to broadcast on the public airwaves is a commodity of great value." (A. 29a). The court impliedly recognized that broadcast licensees might be recipients of federal financial assistance under the HEW § 504 regulation which the court characterized as "expansive" (A. 32a, n. 63). In concluding that § 504 did not apply, the court found significance in the fact that HEW did not "issue regulations specifically applicable to commercial broadcast licensees or ask the FCC to do so." *(Ibid.)* But the generality of the HEW regulation plainly includes a broadcast license, as petitioners have demonstrated above. There would have been no occasion for HEW to issue regulations specifically applicable to commercial broadcast licensees because commercial licensees do not receive their federal financial assistance from HEW. Under Executive Order 11914, the agency that grants the federal financial assistance is obligated to issue its own § 504 regulation. Similarly, there would have been no occasion for HEW to ask the FCC to issue a § 504 regulation. HEW was charged only with the task of issuing general regulations for the guidance of all federal agencies providing financial assistance. Each federal agency has the obligation of then issuing 504 guidelines if it grants federal financial assistance. It is thus plain that nothing that HEW did, or did not do, supports the conclusion that commercial broadcasters do not receive federal financial assistance from the federal government through the FCC.

There is nothing in the legislative history of § 504 to support the court's conclusion that a broadcast license is not federal financial assistance. When § 504 was passed in

1973, it was accompanied by *no* legislative history at all. Engebretson, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation*, 16 Harv.J.Leg. 59, 63 (1979) (hereafter "Engebretson, *Administrative Action*"). To remedy this omission, and the ensuing federal administrative indifference to the mandates of the original Act, Congress adopted the 1974 Rehabilitation Act Amendments, and attached to them a lengthy legislative history. *Id.* at 64, S.Rep. No. 93-1297 at 97-113 (letter from Senator Harrison Williams and others to Secretary of Labor, requesting that more precise regulations be adopted). This "post-legislative history" clarifies Congressional intent that § 504 be construed broadly: "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964 . . . and section 901 of the Education Amendments of 1972 . . . . The section therefore constitutes the establishment of a broad government policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap." (*Id.* at 39).

The court reached its conclusion that § 504 did not apply to commercial broadcasters by turning to the legislative history of Title VI of the 1964 Civil Rights Act. The court purportedly found "ample evidence to conclude that Congress did not intend Title VI to reach the recipients of licenses from the FCC." (A.30a) There is nothing in the § 504 legislative history stating that Title VI legislative history controls the construction of § 504. The references to Title VI merely mean that § 504, like other civil rights statutes, is to be accorded a sweep as broad as their language permits. See, Engebretson, *Administrative Action, supra*.

Additionally, the beneficiaries of section 504, the handicapped, have different problems from the beneficiaries of Title VI, ethnic minorities and so the legislative history of

one Act should not control the construction of the other. Unlike discrimination against minorities which, until the Civil Rights Act of 1964, was recognized but tolerated in many parts of the country, discrimination against the handicapped has until recently gone virtually unnoticed. This is so even though individuals with handicaps "are all too often excluded from schools and educational programs, barred from employment or are underemployed because of archaic attitudes and laws, denied access to transportation, buildings, and housing because of architectural barriers and lack of planning, and are discriminated against by public laws which frequently exclude individuals with handicaps or fail to establish appropriate enforcement mechanisms." (S.Rep. No. 93-1297 at 50).

Thus, the needs of the handicapped are equally as great as those of other minorities, but their story has largely gone untold: "[T]he American people are simply unfamiliar with and insensitive to difficulties confront[ing] individuals with handicaps." *Id.* See also, S.Rep. No. 95-890, 95th Cong., 2d Sess. (1978) at 33, 64. The legislative history of the Rehabilitation Act Amendments of 1974 and 1978 demonstrate that an essential purpose of this remedial legislation was to "serve as an important means of focusing greater public attention on the problems and needs of individuals with handicaps." S.Rep. No. 93-1297 at 51. This purpose sets § 504 apart from Title VI; § 504 regulations should more clearly apply to the communications industry, where the "problems and needs of individuals with handicaps" can most readily be conveyed to the widest possible audience.

Even if Title VI legislative history were controlling, there is no justification for the crabbed reading given it by the FCC and the court below. The court cites isolated and ambiguous language of individual members of Congress to

reach its conclusion that Congress intended the term "federal financial assistance" to be understood as meaning "funds" and "public monies out of the federal treasury." (A.30a). This narrow definition of "federal financial assistance" cannot withstand analysis. Prior to the passage of § 504, the courts and federal agencies responsible for enforcing the mandates of Title VI construed federal financial assistance broadly. In 1973, when § 504 was enacted, Congress was aware that the Title VI regulations' definition of "federal financial assistance" included:

> "(1) grants and loans of federal funds, (2) *the grant* or donation *of federal property* and *interest in property*, (3) the detail of *federal personnel*, (4) the sale and lease of, and the *permission to use* (on other than a casual or transient basis), *federal property or any interest in such property without consideration or at a nominal consideration*, or at a consideration which is reduced for the purpose of assisting the recipient, or *in the recognition of the public interest to be served by such sale or lease to the recipient*, and (5) any federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance." (See, e.g., 28 C.F.R. § 42.101 (Dept. of Justice); 45 C.F.R § 80.13 (HEW)) [Emphasis added]

The judiciary also had given the term "federal financial assistance" an expansive reading prior to the enactment of § 504. *McGlotten v. Connally*, 338 F.Supp. 448 (D.C. Cir. 1972). Significantly, the *McGlotten* case applied the term to passive federal subsidies, just prior to the passage of the Rehabilitation Act. Thus the arguments that passive subsidies are not included in "federal financial assistance" runs counter to principles of statutory construction. The court of appeals overlooked this contention, failing to distinguish *McGlotten*.

Petitioners respectfully submit that the court below erred when it concluded that the legislative history of § 504 was governed by several statements by individual members of Congress during debate on the 1964 Civil Rights Act. These isolated statements by members of Congress or its committees, or by the Department of Justice, all made a decade before § 504 was enacted, cannot support the court's conclusion that the Congress intended to give a narrow, rather than a broad, meaning to the term "federal financial assistance" as that term was used in § 504. See *Southeastern Community College v. Davis*, 442 U.S. 397 n. 11.

II

THE COURT BELOW ERRED IN AFFIRMING THE FCC FINDING THAT THE SERVICE OF THE COMMERCIAL BROADCASTERS WAS ADEQUATE TO JUSTIFY RENEWAL IN THE PUBLIC INTEREST WITHOUT AT LEAST INQUIRING SPECIFICALLY INTO THEIR EFFORTS TO MEET THE PROGRAMMING NEEDS OF THE HEARING IMPAIRED, IN LIGHT OF § 504.

Under Section 309 of the Communications Act, 47 U.S.C. 309, Congress has mandated that the Federal Communications Commission consider whether an applicant for renewal of a broadcast license has served the public interest, convenience and necessity. Petitioners submit that the court below erred by not reversing the Commission's failure to consider the national antidiscrimination policy inherent in the Rehabilitation Act as part of that "public interest" inquiry. Petitioners submit that Section 504 of the Rehabilitation Act applies to commercial broadcasters as well as noncommercial licensees; the antidiscrimination policy of the Rehabilitation Act has just as much relevance to the public interest standard of the Communications Act as does the antidiscrimination policies relating to race and sex, and the antitrust policies that are often relied upon in FCC public

interest determinations. As this Court observed in *NAACP v. FPC*, 425 U.S. 662, 670, n. 7, the Communications Act imposes on the FCC an obligation "to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." Indeed to ignore the rights of the deaf and disabled here denies them of equal protection of law.

The court below held that public television stations are recipients of federal financial assistance and concluded that the Commission could not find the service of such stations to be adequate to justify renewal without at least inquiring specifically into their efforts to meet the programming needs of the hearing impaired. The court stated that the absence of guidelines implementing § 504 as it applies to public television licensees "could not justify a licensee's disregard of, or indifference to, the policies of the statute." (A.26a). The court continued: "Eight years after the passage of the Rehabilitation Act, we cannot accept that a public station still has no duty to make reasonable efforts to serve the handicapped, or that this duty cannot be enforced, in an agency proceeding, by an intended beneficiary of the statute." (*Ibid.*) Assuming, as petitioners do, that commercial broadcasters, like public broadcasters, are recipients of federal financial assistance, the commercial broadcasters must be held to the same standard imposed by the court on the public broadcasters.

CONCLUSION.

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Dated: October 2, 1981.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1722

SUE GOTTFRIED, Individually and on Behalf of the Deaf and Hearing Impaired Population Within the Stations' Viewing Area, and GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

NATIONAL BROADCASTING COMPANY, INC., COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA, METROMEDIA, INC., AMERICAN BROADCASTING COMPANIES, INC., KCOP TELEVISION, INC., RKO GENERAL, INC., GOLDEN WEST BROADCASTERS, and CBS, INC., INTERVENORS

Appeal from Orders of the Federal Communications Commission

Argued November 5, 1980

Decided April 17, 1981

Judgment entered this date ←

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Abraham Gottfried and *Charles M. Firestone* for appellants.

Randolph J. May, Counsel, Federal Communications Commission, with whom *Robert R. Bruce*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Keith H. Fagan* and *Mary Lee Lindquist*, Counsel, Federal Communications Commission, were on the brief, for appellee. *Lisa B. Margolis*, Counsel, Federal Communications Commission, entered an appearance for appellee.

Timothy B. Dyk, with whom *J. Roger Wollenberg* and *Judith Barry Wish* (for intervenor CBS, Inc.), *James A. McKenna, Jr.*, *Mark D. Roth*, and *Carl R. Ramey* (for intervenor American Broadcasting Companies, Inc.), *Michael J. McCarthy* (for intervenor Golden West Broadcasters), *Howard F. Roycroft*, *Richard S. Rodin*, and *Marvin J. Diamond* (for intervenor KCOP Television, Inc.), *Thomas J. Dougherty* and *Preston R. Padden* (for intervenor Metromedia, Inc.), *Bernard Koteen*, *Arthur B. Goodkind*, and *Howard Monderer* (for intervenor National Broadcasting Company, Inc.), and *J. Laurent Schaff* and *Jack N. Goodman* (for intervenor RKO General, Inc.) were on the joint brief, for intervenors CBS, Inc. *et al.* *Margot Smiley Humphrey* entered an appearance for intervenor National Broadcasting Company, Inc.

Edgar F. Czarra, Jr. and *Mark D. Nozette* were on the brief for intervenor Community Television of Southern California.

Before MCGOWAN, *Chief Judge*, WRIGHT, *Circuit Judge*, and GASCH,* *District Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

Opinion concurring in part and dissenting in part filed by *Chief Judge* McGOWAN.

WRIGHT, *Circuit Judge*: This case, involving denial by the Federal Communications Commission (FCC or Commission) of a petition to deny license renewals to eight Los Angeles television stations,[1] presents difficult questions concerning the obligations of public and commercial broadcasters to attempt to meet the programming needs of persons with impaired hearing. The issues arise under two statutes: the Communications Act,[2] under which the Commission can renew a station's license only upon a finding that its programming has served the public interest, and Section 504 of the Rehabilitation Act of 1973,[3] which prohibits discrimination against "otherwise qualified" handicapped persons by recipients of federal financial assistance. Because public television stations are apparently bound by Section 504 of the Rehabilitation Act to provide service to "otherwise qualified" handicapped persons, we do not believe that the FCC could find the service of such stations to be adequate to justify renewal without at least inquiring specifically into their efforts to meet the programming needs

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[1] There are seven commercial stations and licensees involved: KABC-TV, American Broadcasting Companies, Inc.; KCOP-TV, KCOP Television, Inc.; KHO-TV, RKO General, Inc.; KNBC-TV, National Broadcasting Co., Inc.; KNXT-TV, CBS, Inc.; KTLA-TV, Golden West Broadcasters; and KTTY-TV, Metromedia, Inc. The eighth station is a noncommercial or public station, KCET-TV, licensed to Community Television of Southern California.

[2] The Communications Act of 1934, ch. 652, 48 STAT. 1064, *as amended*, 47 U.S.C. § 151 *et seq.* (1976) (hereinafter cited to U.S. Code only).

[3] Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 STAT. 357, *as amended*, 29 U.S.C. § 794 (1976) (hereinafter cited to U.S. Code only). The provision is quoted in text at note 37 *infra*.

of the hearing impaired. Accordingly, we hold that the challenge to the license renewal of public station KCET-TV must be remanded to the Commission for further proceedings.

We conclude, however, that Section 504 does not apply directly to commercial broadcasters. We therefore hold that the decision of the Commission concerning the seven commercial stations may be upheld, on the basis of both the record compiled below and the Commission's representations of substantial progress in extending the benefits of commercial television to the hearing impaired. In so doing, however, we recognize that the Commission's statutory obligation to pursue the public interest requires it to protect the interests of the hard of hearing in having meaningful access to commercial broadcasting. We also note that rulemaking might be a better, fairer, and more effective vehicle for considering how the broadcast industry is required to provide the enjoyment and educational benefits of television to persons with impaired hearing. Radio has been available to the general public for over half a century, as has television for over a quarter century. But millions of Americans have lived and died during that time without being able to enjoy radio and television simply because their hearing was impaired. It is time for the Commission to act realistically to require, in the public interest, that the benefits of television be made available to the hard of hearing now.

I. Background

A. *Statutory Context*

This case, in which appellants challenge an FCC order denying a petition to deny license renewals to eight Los Angeles television stations,[4] arises against a com-

[4] *See License Renewal Applications of Certain Television Stations Licensed For and Serving Los Angeles, California*, 69 FCC2d 451 (1978) (*Order*) (*reprinted at* Joint Appendix (JA) 1), *reconsid. denied*, 72 FCC2d 273 (1979) (*Reconsideration*) (JA 11).

plex background of federal statutes and administrative action. The Communications Act of 1934 charges the Federal Communications Commission with granting broadcast licenses and license renewals.[5] The Commission does so pursuant to a general mandate to protect and advance "the public interest, convenience, and necessity."[6] Although this mandate is general, the Commission has in fact interpreted it through the issuance of a number of regulations and guidelines. These Commission guidelines typically govern decisions about whether to renew broadcast licenses in cases where there is no announced competitor for a license held by the applicant for renewal.[7] Although the statute provides that "[a]ny party in interest may file with the Commission a petition to deny any application,"[8] the Commission need generally hold no hearings unless the petition raises a "substantial and material question of fact"[9] concerning

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[5] *See* 47 U.S.C. §§ 307-309 (1976).

[6] *See* 47 U.S.C. §§ 307(d), 309(a), 309(d) (1976).

[7] It is well settled that the Commission, in order to obviate the need for repetitive hearings, may specify by rule the criteria that will govern its decisions. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-205 (1956); *American Tel. & Tel. Co. v. FCC*, 539 F.2d 767, 774-775 (D.C. Cir. 1976). The Commission is not, of course, permitted to proceed pursuant to rules that are inconsistent with the underlying intent and purpose of the Communications Act. *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1212-1214 (D.C. Cir. 1971).

[8] 47 U.S.C. § 309(d) (1976).

[9] *See* 47 U.S.C. §§ 309(d)(2), 309(e) (1976). Where the Commission specifies by rule the criteria that will govern its licensing decisions, *see* note 7 *supra*, questions falling outside the ambit of those rules will ordinarily not be regarded as substantial or material, unless the party opposed to the Commission's adopted policies asserts reasons sufficient to justify a change or waiver of the rules. *United States v. Storer Broadcasting Co.*, *supra* note 7, 351 U.S. at 205; *American Tel. & Tel. Co. v. FCC*, *supra* note 7, 539 F.2d at 774.

the incumbent licensee's satisfaction of pertinent Commission standards. Where no question is raised concerning the station's compliance with Commission guidelines, renewal is generally granted without public hearing.

Both the courts and the FCC have construed the "public interest" standard for license awards to include a requirement that broadcasters endeavor to discover and to meet the programming needs of all significant groups within their areas of service.[10] The Commission publishes a list of specific groups whose needs must be "ascertained."[11] At least since 1970 it has urged licensees to make efforts to serve the hearing impaired,[12] a group estimated to include at least 13 million people, nationwide.[13] But the Commission has declined to in-

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[10] *See, e.g., Stone v. FCC*, 466 F.2d 316, 327-328 (D.C. Cir. 1972); *Amendment of the Primer on Ascertainment of Community Problems by Commercial Broadcast Applicants, Permittees and Licensees*, Docket No. 78-237 (April 4, 1980); *Ascertainment of Community Problems by Broadcast Applicants*, 53 FCC2d 3 (1975).

[11] *See Renewal Primer*, 57 FCC2d 418, Appendix D, 447 (1976). The 19 "ascertainment" categories mandate inquiries into the service needs of (1) agriculture, (2) business, (3) charities, (4) civic, neighborhood, and fraternal organizations, (5) consumer service organizations, (6) culture, (7) education, (8) the environment, (9) government, (10) labor, (11) the military, (12) minority and ethnic groups, (13) organizations of and for the elderly, (14) organizations of and for women, (15) organizations of and for youth and students, (16) professions, (17) public safety, health, and welfare, (18) recreation, and (19) religion.

[12] *See The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 FCC2d 917 (1970).

[13] *See Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf*, Docket No. 20693, 63 FCC2d 378, 379 (1976).

clude the hearing impaired among the groups whose needs must specifically be consulted.[14] Nor has it ever promulgated guidelines requiring entertainment programming for the hard of hearing. The Commission has, however, insisted that emergency broadcasts must be made accessible to the deaf,[15] and, whenever individual broadcasters have sought Commission approval for innovative service to the hearing impaired, the Commission has given its approval.[16] For example, the Commission

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[14] The proposal that the handicapped should constitute a separate "ascertainment" category was specifically rejected in *Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants in Regard to the Community Leader Survey*, Docket No. 78-237, FCC 80-134 (released April 4, 1980).

[15] *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, Docket No. 20659, 61 FCC2d 18 (1976), *recondsid. denied*, 62 FCC2d 565 (1977).

[16] The most notable efforts in this area involve "closed captioning"—a method of subtitling, similar to that used in foreign language films, but different in that it can only be seen on television sets equipped with decoding units. In 1972 the Commission authorized the Public Broadcasting System to initiate experiments with closed captioning, and in 1976 it promulgated rules to permit closed captioning by any broadcaster. *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf, supra* note 13. The Commission has also instituted a clearinghouse program to provide information that would assist licensees in employing persons with various handicaps. The clearinghouse furnishes research data and reports concerning equipment availability and modification, and about various means to increase employment of and service to the handicapped. *See Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395*, Docket No. 21474, FCC 80-62 (released March 6, 1980).

in 1976 adopted rules to permit "closed captioning" for visual display of aural material accompanying television programs.[17] Pursuant to this grant of permission, the Public Broadcasting Service (PBS) and two of the commercial networks began in March 1980 to provide a total of up to 20 hours a week of programming captioned by the National Captioning Institute.[18] The FCC has also emphasized in its public pronouncements that "licensees can and will be responsive to the needs of their [hearing impaired] viewers, but it is still the responsibility of

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[17] *See* note 16 *supra.*

[18] Brief for appellee at 5. The two commercial networks that are participating are the American Broadcasting Co. (ABC) and the National Broadcasting Co. (NBC). According to the National Captioning Institute, the Fall 1980 schedule of closed captioned programs included the ABC series Love Boat, Barney Miller, Eight is Enough, Friday Night Movie, and Three's Company, and the NBC series Disney's Wonderful World, Little House on the Prairie, Diff'rent Strokes, and Sunday Big Event. More than 15 PBS series are also captioned. *See National Captioning Institute, Schedule of Closed-Captioned Programs Fall 1980* (1980). The third major commercial network, the Columbia Broadcasting System (CBS), is also involved in experimental efforts to provide the advantages of programming to the hard of hearing through a system known as "teletext." On July 29, 1980 CBS petitioned the FCC seeking a rulemaking leading to promulgation of rules that would allow television stations to undertake teletext transmission. *See Amendment of Part 73, Subpart E of the Rules Governing Television Broadcast Stations to Authorize Teletext,* RM-3727. "Teletext" is a generic name for systems that transmit letters, numbers, and other characters that can be made to appear on television screens equipped with special decoders. Because teletext could be used to provide information to the general public, CBS believes that it would ultimately be more useful to the hearing impaired, and also less expensive, than would a closed captioning system.

each licensee to determine how it can most effectively meet those needs." [19]

Although it has recognized that Section 504 of the Rehabilitation Act of 1973 may impose a statutory obligation on public television stations to accommodate at least some of their programming to the needs of the hearing impaired,[20] the FCC has thus far declined to take specific steps to enforce the Act.[21] The Department of Education has been officially designated as the agency to develop guidelines clarifying the specific obligations imposed on public broadcasters by Section 504.[22] The

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[19] *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations, to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf, supra* note 13, 63 FCC2d at 389.

[20] *See Order, supra* note 4, 69 FCC2d at 459, JA 9.

[21] *See id.* at 458-459, JA 8-9; *Reconsideration, supra* note 4, 72 FCC2d at 276-280, JA 14-18.

[22] The responsibility was originally assigned to the Department of Health, Education and Welfare (HEW). *See* Executive Order 11914, 41 FED. REG. 17871 (April 28, 1976). Acting on the advice of HEW's Office of Civil Rights (OCR), Secretary Harris concluded in October 1979 that § 504 was applicable to public broadcasters receiving federal financial assistance, and she instructed OCR to develop compliance standards for public stations. No standards had yet been promulgated, however, when the Department of Education was established on May 4, 1980. Under the Department of Education Organization Act, Pub. L. No. 96-88, 93 STAT. 691 (1979), the Department of Education assumed responsibility for administration of programs that provide financial assistance for production of programs shown on public television. The HEW study group that was involved in preparation of § 504 compliance guidelines for public television was also transferred to the Department of Education, and it remains there, located in the office of the Assistant Secretary for Civil Rights.

On January 19, 1981 the Department of Education issued a *Notice of Intent to Develop Regulations* concerning the

FCC has indicated that if any broadcaster should be found by another agency of government to be in violation of Section 504, it would "consider the effect of that violation upon the licensee's qualifications." [23] But because it is not the agency responsible for enforcement of the Rehabilitation Act, the FCC has stated that it will not attempt to hold broadcasters to any obligations thereunder, at least until the responsible agency has spoken.[24]

B. *Factual Background*

Sue Gottfried is a hearing impaired member of the Los Angeles community. On October 28, 1977, on behalf of herself and others similarly situated, Mrs. Gottfried filed petitions to deny the license renewal applications of eight Los Angeles television stations.[25] In her petitions pertaining to the seven commercial licensees Mrs. Gottfried alleged generally that the stations had failed to ascertain or to meet the needs of the hearing impaired. She further argued that the stations, as re-

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rights of persons with impaired hearing to access to television programs. 46 FED. REG. 4954 (Jan. 19, 1981). It remains uncertain, however, when the rulemaking process will be completed. In *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California, d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.), the District Court ordered the Department to issue final regulations not later than February 17, 1981. But the District Court's order has been stayed by the Ninth Circuit, pending appeal. *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California, d/b/a KCET-TV*, Nos. 80-5400 and 80-5445 (9th Cir. Dec. 19, 1980) (order staying order of lower court and ordering expedition of appeal).

[23] *Reconsideration, supra* note 4, 72 FCC2d at 278, JA 16.

[24] *Order, supra* note 4, 69 FCC2d at 458-459, JA 8-9; *Reconsideration, supra* note 4, 72 FCC2d at 276-280, JA 14-18.

[25] *See Order, supra* note 4, 69 FCC2d at 451-452, JA 1-2; JA at 29.

cipients of valuable federal licenses, had failed to satisfy obligations imposed on them by Section 504 of the Rehabilitation Act of 1973. Regarding the public station KCET-TV, Mrs. Gottfried repeated her general claims and arguments, but she also added the specific charge that the station had shown indifference to the needs of the deaf by failing to broadcast, through most of its license term, a captioned version of the ABC Evening News that was made available to it by the Public Broadcasting Service.[26]

On September 8, 1978 the FCC denied Mrs. Gottfried's petitions to deny license renewals to the eight stations.[27] The petitions, the Commission said, had "failed to allege specific facts which raised any substantial or material question as to whether a grant of the renewal applications before us would serve the public interest, convenience, and necessity." [28] The FCC based this conclusion on the failure of the petitions to allege violations of any specific Commission standards or guidelines. The Commission noted that it had no requirement that stations develop demographic data related to the hearing impaired population of a service area, specifically ascertain the needs of the deaf, or utilize captioning or other techniques to make programming accessible to the hard of hearing.[29] The Commission also found that Section 504 of the Rehabilitation Act did not apply to the commercial licensees,[30] and it stated that the Department of Health, Education and Welfare (HEW) was the appropriate agency to consider whether the public station

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[26] *See* JA at 24-28.

[27] *Order, supra* note 4, 69 FCC2d at 451, JA 1.

[28] *Id.* at 459, JA 9.

[29] *Id.* at 458, JA 8.

[30] *Id.* at 459, JA 9.

had violated the Act.[31] Although it said that it would give consideration to any adverse finding that HEW might reach, the Commission denied that a petitioner could raise a "substantial or material" renewal question merely by alleging noncompliance with the Rehabilitation Act or with the national policy expressed by that statute.

The appellants[32] responded to the Commission's order by filing a petition for reconsideration, in which they alleged, in elaborated form, essentially the same arguments they had made earlier.[33] They also filed supplemental pleadings in which they presented evidence that viewers were not averse to captioned programming and claimed that the Commission was obligated by HEW regulations and by Executive Order to implement Section 504 of the Rehabilitation Act.[34] Once again, the Commission dismissed the petition as failing to present a

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[31] *Id.* Responsibility for issuance of guidelines applying § 504 to public television has since been shifted to the Department of Education. *See* note 22 *supra*. The FCC apparently now considers that Education is the agency responsible for determining statutory violations.

[32] The Commission originally determined that Mrs. Gottfried was the only signer of the petitions to deny who had established standing before the Commission. *See Order*, *supra* note 4, 69 FCC2d at 453, JA 3. But the standing of the Greater Los Angeles Council on Deafness, Inc. (GLAD) was at least implicitly recognized by the Commission in *Reconsideration*, *supra* note 4, 72 FCC2d 273, JA 11, even though the Commission declined to reverse its earlier standing determination. *See id.* at 280, JA 18. GLAD is before this court as an appellant, together with Sue Gottfried, individually and on behalf of the hearing impaired population within the stations' viewing area.

[33] *See Reconsideration*, *supra* note 4, 72 FCC2d at 276, JA 14.

[34] *Id.* at 275-276, JA 13-14.

substantial or material question of fact requiring further hearings.[35] Because the petitioners had not effectively challenged the stations' compliance with stated FCC requirements, the Commission held that they had not raised a substantial claim that the licensees' service had failed to satisfy the statutory requirement of being in the public interest.

Pursuant to Section 402 of the Communications Act, 47 U.S.C. § 402 (1976), Mrs. Gottfried appealed the decision of the Commission to this court.

II. Issues on Appeal

The issues presented in this appeal are complicated by the contested relationship between two statutes, the Communications Act and the Rehabilitation Act of 1973. The Rehabilitation Act does not directly impose any enforcement obligation on the FCC. But the Communications Act does require the FCC to make determinations about the requirements of the "public interest," and appellants argue that the "public interest" standard must be construed to require at least some consideration of the national policy expressed by the Rehabilitation Act and any legal obligations imposed on the stations by Section 504. We agree.

Because the parties have assumed that Section 504 of the Rehabilitation Act applies to public television stations,[36] we begin by considering the obligation of the FCC

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[35] *See id.* at 281, JA 19.

[36] In its brief in this court, *see* brief for appellee at 15-16 & n.9, the FCC states that it had determined to defer to the judgment of HEW on this question, and that "[i]n the case entitled *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California d/b/a KCET-TV, et al.*, Civil No. 78-4715-R (C.D. Cal.), HEW stated that it had determined that Section 504 is applicable to public

to weigh compliance with this standard in a challenge to renewal of a license such as that involved in this case. This discussion yields the conclusion that the case of the public station must be remanded to the Commission. We then consider the argument that Section 504 applies to the commercial stations, and conclude that it does not. Although the Commission may still be obliged to weigh the national policy of the Rehabilitation Act within the public interest standard, the commercial stations themselves have been assigned no direct statutory obligations to the hearing impaired. We therefore determine that the Commission has a range of discretion in assessing what commercial stations must do in the public interest, and in consideration of both its expertise and its efforts in the area, we defer to its judgment at this

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television stations that receive federal financial assistance." As an intervenor in this court KCET-TV does not expressly concede the applicability of § 504, noting that Congress went to some lengths to assure that programming funded by the Corporation for Public Broadcasting is insulated from federal control and regulation. *See* brief for intervenor Community Television of Southern California at 15 n.7. Significantly, however, KCET-TV does not deny that it is a recipient of federal funds channeled to it through the Corporation for Public Broadcasting. Moreover, although it was generally eager to keep public broadcasting free from "governmental interference or control," *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 293 (D.C. Cir. 1975), Congress not only did not intend to free public broadcasters from all legal standards, *see id.* at 294-296, but actually created some programming standards applicable to public broadcasters only, *see id.* at 291 & n.7. We therefore reject any implied argument that Congress could not have intended federal funds channeled through the Corporation for Public Broadcasting to count as federal financial assistance merely because such a construction would subject recipients to a statutory requirement of nondiscrimination against the handicapped.

The administrative agencies responsible for implementing the Rehabilitation Act have held consistently that § 504 applies to public television broadcasters. *See* note 22 *supra*.

time. We repeat, however, that in our view television, both public and commercial, should be made available to persons with impaired hearing now.

III. Public Stations

Section 504 of the Rehabilitation Act of 1973 provides:

> No otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from * * * participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[37]

In this case appellants urge that public television station KCET-TV is a recipient of federal financial assistance subject to the statute. This claim rests on two bases. First, appellants argue that a broadcast license is itself a valuable commodity constituting "financial assistance" as that term is used under the Rehabilitation Act.[38] Second, appellants argue that KCET-TV, as a "public" or noncommercial educational broadcasting station, is subsidized by congressional appropriations channeled, among other sources, through the National Telecommunications and Information Administration of the Department of Commerce and the Corporation for Public Broadcasting.[39]

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[37] 29 U.S.C. § 794 (1976).

[38] This argument is based largely on the proposition that a license to broadcast on the public airwaves is a valuable commodity. *See* brief for appellants at 32-41. Although not explicitly disputing that broadcast licenses possess economic value, the FCC argues that Congress did not intend broadcast licenses to count as "Federal financial assistance" for purposes of applying the Rehabilitation Act. *See* brief for appellee at 15-30.

[39] Under the Educational Broadcasting Facilities Act, 76 Stat. 46 (1962), and the Public Broadcasting Act, 81 Stat. 365 (1967), 47 U.S.C. §§ 390-399 (1976 & Supp. III 1979), as

In its brief in this court the FCC does not dispute the applicability of Section 504 to public station KCET-TV. At the time it was the agency responsible for interpretation of the Rehabilitation Act—and thus at a time when its construction would have been due "substantial deference" from a reviewing court[40]—the Department of

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amended by the Public Telecommunications Financing Act, 92 STAT. 2405 (1978), public or noncommercial educational broadcasting stations, such as KCET-TV, are subsidized by federal appropriations dispensed through the National Telecommunications and Information Administration of the Department of Commerce and/or the Corporation for Public Broadcasting. The Corporation, a nonprofit organization created by federal statute, receives funds directly from the federal treasury, subject to a number of statutory directives and prohibitions concerning how the funds may be spent. *See* 47 U.S.C. § 396 (1976 & Supp. III 1979).

During its 1977 fiscal year, KCET-TV received $2,363,927 —more than 18% of its total revenues—from the Corporation for Public Broadcasting. *See* Private Defendants' Proposed Findings of Fact, Statements of Fact as to Which There Is No Genuine Issue, and Proposed Conclusions of Law (Sept. 28, 1979), *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.). In the same year the station also got $495,229 from the Public Broadcasting Service, which in turn is largely funded by the Corporation for Public Broadcasting. KCET-TV's revenues for 1977 also included $2,298,160 in restricted program grants provided directly by various agencies of the federal government. *See* note 44 *infra* and accompanying text.

[40] An administrative interpretation of a statute is due substantial weight from a reviewing court when it reflects "a contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (citation omitted); *see E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 134-135 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Health, Education and Welfare determined that Section 504 applies to public broadcasting stations.[41] The Department of Education, which has now assumed responsibility for developing guidelines applicable to public broadcasters, has apparently accepted this conclusion,[42] and the FCC has indicated a willingness to defer to its judgment.[43]

The case of KCET-TV also exhibits incidences of more direct and traditional "Federal financial assistance." During 1977, the year in which KCET-TV's petition for license renewal was challenged, federal agencies combined to provide the station with $2,298,160—an amount representing roughly 17 percent of its revenues for the year—in restricted program grants.[44] The contributing agencies included the National Institute for Education, which granted $1,814,090; the National Endowment for the Arts, $461,872; the National Endowment for the Humanities, $18,243; and the United States Information Agency, $3,955. We therefore conclude that Section 504 imposed legal obligations on station KCET-TV during

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[41] HEW in fact began to develop compliance guidelines for public broadcasters in October 1979, but it had not completed the task prior to its split into separate Departments of Health and Human Services and of Education in May 1980.

[42] The Department of Education has recently issued a *Notice of Intent to Develop Regulations. See* note 22 *supra.*

[43] *See* brief for appellee at 15-16 n.9; *Order, supra* note 4, 69 FCC2d at 459, JA 9 ("[I]n the event some adverse finding were made relative to Section 504, the Commission would take whatever action would be appropriate.").

[44] *See* Private Defendants' Proposed Findings of Fact, Statements of Fact as to Which There Is No Genuine Issue, and Proposed Conclusions of Law (Sept. 28, 1979), *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.).

the term of its license preceding the renewal challenge, and we assume that it continues to do so.

There remain, however, important issues concerning the duty of the FCC to define the station's responsibilities under the Rehabilitation Act and to enforce the Act's policies in license renewal proceedings. The FCC is not the agency primarily responsible for enforcing the Rehabilitation Act. Nonetheless, appellants argue that the Act's Section 504 reflects a partial congressional definition of the FCC's obligation to serve "the public interest"—in effect, a specification that the FCC must consider compliance with Section 504's nondiscrimination requirement in determining whether a public broadcaster has satisfied the public interest standard.[45] Second, appellants argue that the FCC is bound to take immediate action to implement Section 504, at a minimum by bringing its policies to bear in renewal proceedings such as this.[46] The FCC, noting that no guidelines have yet been issued by the Department of Education, takes a different view. The Commission asserts that it would be unfair to penalize a station in a license renewal proceeding for noncompliance with a statute for which interpretive guidelines were not in existence during the term of the license.[47]

Under the special circumstances presented by this case, we agree with appellants that the FCC is obligated to take account of a public broadcaster's legal duties under Section 504 in making its public interest determinations. Moreover, given the variety of procedural options pursuant to which the FCC could avoid unfair harshness to the broadcaster, we cannot accept that the public television stations need to be regarded by the Commission

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[45] *See* brief for appellants at 47-50.

[46] *See id.* at 51-55.

[47] *Reconsideration, supra* note 4, 72 FCC2d at 279, JA 17.

as free from any enforceable obligations under Section 504 until interpretive guidelines are issued.

A. *Section 504 and the Public Interest Standard*

The FCC is directed to renew broadcast licenses only if it finds that renewal would serve the "public interest, convenience, and necessity." 47 U.S.C. § 309(a) (1976). In construing this standard we must of course accord substantial deference to the Commission's judgments. As the Supreme Court has recently observed, " 'the weighing of policies under the "public interest" standard is a task that Congress has delegated to the Commission in the first instance.' " *FCC v. WNCN Listeners Guild*, —— U.S. ——, ——, 49 U.S. L. WEEK 4306, 4310 (March 24, 1981), *quoting FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978). Yet there remains, under the Communications Act, an inescapable judicial role. Although the "public interest" standard requires judgments of policy, *see FCC v. WNCN Listeners Guild, supra*, —— U.S. at ——, 49 U.S. L. WEEK at 4310, it also contains an irreducible element of law, *see National Broadcasting Co. v. United States*, 319 U.S. 190, 224-226 (1943), which makes judicial review both necessary and possible. *Cf. NAACP v. FPC*, 425 U.S. 662, 669 (1976) ("[T]he words 'public interest' in a regulatory statute * * * take meaning from the purposes of the regulatory legislation."). It is the function of the judiciary to resolve disputed questions of law. *See Internat'l Brhd of Teamsters v. Daniel*, 439 U.S. 551, 566 & n.20 (1979).

In their brief in this court appellants argue that the FCC's "public interest" mandate must be construed to incorporate the national policy of nondiscrimination against the handicapped minority, at least insofar as that policy imposes specific legal obligations under Section 504 of the Rehabilitation Act of 1973. We agree.

We begin with the settled proposition that a federal agency, in construing the requirements of the "public interest" under its governing statute, must at least give weight to federal laws and public policies addressed to similar purposes. *See, e.g., McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1944) (Interstate Commerce Commission obliged to weigh policies implicit in Sherman Act); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968) (Federal Power Commission, operating under public interest mandate, is "obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations"); *City of Pittsburgh v. FPC*, 237 F.2d 741, 754 (D.C. Cir. 1956) (FPC obligation to consider antitrust factors not alleviated by fact that antitrust enforcement generally committed to Attorney General); *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 357 (D.C. Cir. 1949); *see also FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244 (1968) (antitrust laws are tool by which regulatory agency gives "understandable content to the broad statutory concept of the 'public interest'"); *National Broadcasting Co. v. United States*, *supra*, 319 U.S. at 222-224. It makes no difference in such cases that Congress may have vested primary responsibility for enforcement of a statutory policy in another agency. As the Supreme Court has made clear, the grant of enforcement power to one organ of government does not free others to ignore national laws and policies until such time as violations have been proved in the courts. *See, e.g., McLean Trucking Co. v. United States*, *supra*, 321 U.S. at 79-80; *National Broadcasting Co. v. United States, supra*, 319 U.S. at 222-224.

By its passage of the Rehabilitation Act of 1973 Congress placed public stations under a legal obligation to consider and attempt to serve the interests of the nation's hearing impaired minority. Surely the policy of

this statute falls well within the broad purposes of the Communications Act. As the Supreme Court has recognized, the "public interest" standard established by the Communications Act imposes on the FCC an affirmative "obligation * * * to ensure that its licensees' programming fairly reflects the tastes * * * of minority groups." *NAACP v. FPC, supra,* 425 U.S. at 670 n.7.

Following Congress' decision that recipients of federal assistance must extend their programs to otherwise qualified members of handicapped minorities, settled legal principles compel the conclusion that the FCC must, at a minimum, weigh this congressional policy in making "public interest" determinations. It is unreasonable to believe that a public station could give service cognizable as being "in the public interest" without at least making efforts to satisfy its statutory obligations.[48]

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[48] In *Accuracy in Media, Inc. v. FCC,* 521 F.2d 288 (D.C. Cir. 1975), this court held that the Commission lacks jurisdiction directly to enforce legal obligations imposed on the Corporation for Public Broadcasting by the Public Broadcasting Act of 1967, 81 STAT. 365 (1967), *as amended,* 47 U.S.C. §§ 390-399 (1976 & Supp. III 1979). Intervenor KCET-TV suggests that this holding rests on the principle that "the programming of noncommercial broadcast stations such as KCET is insulated from federal control and regulation," brief for intervenor Community Television of Southern California at 15 n.7, and that federal money channeled to noncommercial stations through the Corporation for Public Broadcasting should therefore not be construed as "Federal financial assistance" if such a construction would subject noncommercial broadcasters to federal legal controls. This claim rests on a confusion of arguments. *Accuracy in Media* held that the FCC could not directly, by order or otherwise, enforce the obligations imposed on the Corporation for Public Broadcasting by the Public Broadcasting Act. But the case did not hold that public stations were not recipients of federal financial assistance. It did not hold that they were not subject to legal obligations under other federal statutes. *See* 521 F.2d at 294-296. And, most important, it did not

In holding as we do, we do little more than recall the FCC to a position it has itself asserted in the past. The Commission has frequently recognized its obligation under the public interest standard to protect the interests of minority groups previously excluded from full access to broadcast programming. *See, e.g., Nat'l Organization for Women, NYC Chapter v. FCC*, 555 F.2d 1002, 1017 (D.C. Cir. 1977) (Commission considers "the employment practices of its licensees *to the extent those practices affect the obligation of the licensee to provide programming* that 'fairly reflects the tastes and viewpoints of minority groups' *and to the extent those practices raise questions about the character qualifications of the licensee*") (emphasis in original; footnotes omitted); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC2d 222

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hold that the FCC should not indirectly enforce legal obligations, arising under federal statutes other than the Public Broadcasting Act, in licensing proceedings under the public interest standard. *See id.* at 295-296 & n.33. On the contrary, the court was careful to note that "[w]e find nothing * * * which limits established FCC authority * * * over local noncommercial licensees," *id.* at 295, and that "FCC regulation of the educational licensees was seen as the ultimate check on the public broadcasting system," *id.* at 295-296 n.33.

In recognizing the FCC's continuing and undiminished authority to assess compliance with the public interest standard, the *Accuracy in Media* court noted that, under a provision of the Public Broadcasting Act, 47 U.S.C. § 398 (1970), current version 47 U.S.C. § 398 (Supp. III 1979), no agency of government is authorized to "exercise any direction, supervision, or control" over public telecommunications. *See* 521 F.2d at 292 (*quoting* statute). But the court clearly stated that the "prohibition against governmental interference is expressly limited to [attempts to enforce] authorizations" contained in the Public Broadcasting Act itself, *see* 521 F.2d at 296, and that the FCC's obligation to uphold the public interest arises from a section of the Communications Act, 47 U.S.C. § 309 (1976), to which the prohibition did not apply.

(1976); *Nondiscrimination in Employment Practices of Broadcast Licensees*, 13 FCC2d 766 (1968). Although the Equal Employment Opportunity Commission was given primary responsibility for enforcement of the discrimination prohibitions of the 1964 Civil Rights Act, the FCC recognized its independent responsibility, pursuant to the public interest standard, to carry out the Act's policy. Its authority to do so has been recognized by the courts. *See, e.g., NAACP v. FPC, supra*, 425 U.S. at 670 n.7; *Nat'l Organization for Women, NYC Chapter v. FCC, supra*, 555 F.2d at 1015-1020. And where the Commission has lagged in accepting its responsibility, this court has not hesitated to direct it to do so. *See, e.g., Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59 (D.C. Cir. 1977) (*per curiam*); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). We do not shirk our duty in the present case.

B. *Required Procedures*

In their brief in this court appellants have asked us to remand the license renewal application of public station KCET-TV for a public hearing and other appropriate proceedings by the FCC.[49] We regard this as the proper disposition.

The FCC has objected that KCET-TV complied with all existing Commission rules, and that there is thus

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[49] *See* brief for appellants at 51-53. The FCC understands appellants to argue that the Commission is obligated to impose specific requirements of program captioning on all of its licensees. *See* brief for appellee at 38-39. Even if we believed appellants to be urging such a claim, we would need to reject it at this time, as prematurely interfering with the Commission's discretion to determine what accommodations to the deaf can reasonably be required of licensees under the public interest standard. *See* text accompanying notes 51-52 *infra*.

"no substantial and material question of fact" to be determined before final action on the application.[50] But, as this court has held before, "Under Section 309(e) the Commission must set a renewal application for hearing where 'a substantial and material question of fact is presented *or* the Commission for any reason is unable to make the finding' that the public interest, convenience, and necessity will be served by the license renewal." *Office of Communication of United Church of Christ v. FCC, supra*, 359 F.2d at 1007 (emphasis in opinion of Burger, J.; citation omitted).

Finding that Congress must be understood to have prescribed that the "public interest" encompasses at least the legal interests of the nation's hearing impaired minority, we do not believe that a Commission decision in which this factor has not been weighed can escape condemnation as "arbitrary, capricious, [or] an abuse of discretion."[51] As the Supreme Court held in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1972), satisfaction of this standard requires, at a minimum, "consideration of all relevant factors."

The task of weighing the interests of the hearing impaired is not an easy one, and we do not presume to intrude into the Commission's range of discretion in this difficult area. It is appropriate, however, for us to respond to some of the concerns that the Commission has raised on this appeal.

These concerns arise primarily from the ambiguity of the legislative policy expressed in Section 504. In construing this provision the responsible administrative agencies have concluded that Congress intended recipients of federal funds to make "reasonable accommodations"

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[50] *Order, supra* note 4, 69 FCC2d at 459, JA 9; brief for appellee at 30-40.

[51] 5 U.S.C. § 706(2)(A) (1976).

to provide service to handicapped persons, *see* 45 C.F.R. § 84.12 (1977) (HEW guidelines), current version 34 C.F.R. § 104.12 (1980) (Department of Education guidelines), and the courts have generally accepted this construction, *see, e.g., United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977) (cause remanded to District Court for application of guidelines); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977) (same). But, as the Supreme Court acknowledged in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), the line between lawful refusal to extend affirmative action and illegal discrimination will not always be clear.

Emphasizing the difficulty of line-drawing in this area, the Commission pleads that it has no choice but to stay its hand. The Department of Education is currently engaged in preparation of interpretive guidelines construing the obligations that Section 504 imposes on public broadcasters.[52] Pending completion of those guidelines the FCC has said that it has no basis for assessing compliance with the statute, and that there would be nothing for it to consider in the public hearing requested by appellants. We do not agree.

In pursuing the public policy represented by Section 504 it is not the function of the FCC to adjudicate law violations, or, indeed, to regard itself as bound strictly by the specific dictates of the Rehabilitation Act or interpretive guidelines issued thereunder. *See, e.g., California v. FPC*, 369 U.S. 482, 490 (1962); *United States v. Radio Corp. of America*, 358 U.S. 334, 350 (1959). The Commission's responsibility is rather to effectuate the underlying national policy of providing federally assisted programs, including public television, to handi-

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[52] It remains unclear, however, when the guidelines will be completed. *See* note 22 *supra*.

capped persons, such as the deaf, who are capable of benefitting from them.

In effectuating a policy that is currently framed in general terms only, the FCC must of course proceed with sensitivity to the situation of its licensees. In its review of KCET-TV's renewal application the Commission can appropriately consider the station's uncertainty about the precise requirements imposed on it by Section 504. It would indeed be unfair to insist on strict compliance with a standard developed after the fact, and we expect the FCC neither to develop nor to apply a fully formulated set of guidelines at this time. Nonetheless, it is clear to us that the absence of interpretive guidelines—either now or during the station's license term—could not justify a licensee's disregard of or indifference to the policies of the statute. Eight years after the passage of the Rehabilitation Act, we cannot accept that a public station still has no duty to make reasonable efforts to serve the handicapped, or that this duty cannot be enforced, in an agency proceeding, by an intended beneficiary of the statute. The Commission must therefore proceed immediately to inquire at least into the station's good faith, as manifest in its efforts to provide service in accord with the legislative policy goals of Section 504.

The Commission has also argued that it would be unfair for the issues at the heart of this case to be raised for the first time in a license renewal proceeding.[53] During the term of its license KCET-TV lacked clear standards defining the level of service required by Section 504. And in the absence of prior notice of the FCC's renewal policy, the Commission argues, it would be wrong to penalize a station for its shortcomings.

Our answer to this argument is implicit in what we have said before. Properly conducted, an FCC inquiry

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[53] *See* brief for appellee at 38-39.

will impose no unreasonable burden on the station. Focusing primarily on good faith efforts to interpret and follow statutory policies, it should not enforce numerical criteria on a retroactive basis, but instead assess the station's willingness—as measured against its capacity and its viewers' need—to provide programming for the aurally handicapped.

As the Commission itself has asserted repeatedly, the predominant concern in a license renewal case may be "prospective, seeking to lead a licensee who has not possessed an adequate * * * program in the past to adopt policies ensuring" better performance in the future. *Nat'l Organization for Women, NYC Chapter v. FCC*, *supra*, 555 F.2d at 1017, *quoting Nat'l Broadcasting Co.*, 58 FCC2d 419, 422 (1976); *see Bilingual Bicultural Coalition of Mass Media, Inc. v. FCC*, *supra*, 595 F.2d at 628 & n.24. Consistent with that concern, in a case such as this the FCC may choose among a variety of dispositional alternatives, including short-term or conditional license renewal, as well as standard renewal or denial. We intimate—because we hold—no *a priori* preference among them. The ultimate decision is obviously not for us, but for the Commission,[54] with its special ex-

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[54] Appellants seem at some points in their brief to suggest that there can be no discretion in this matter, because the First Amendment protects the right of all segments of society to have access to programming over the public airwaves. *See* brief for appellants at 55-57. From this premise they appear to deduce a right to have broadcast programming captioned for the hearing impaired. Even if the First Amendment entitles the hearing impaired to have access to some minimum of programming over the airwaves, however, we could not accept that it requires all stations to make their programming accessible to all deaf persons all of the time. *Cf. Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 96 (1973) (frequency scarcity makes it infeasible for all persons wishing to speak to have access to the air). In demanding fair access to the public airwaves for the hearing impaired, the First Amendment, in

pertise concerning what can reasonably be expected of a public broadcaster within the context of current technology and current needs.

We recognize the indefiniteness with which our prescriptions are stated. The guidelines promised by the Department of Education will hopefully resolve many of the uncertainties confronting the stations, the Commission, and this court. But we reiterate our strong view that no guidelines are needed to identify the outlines of Congress' policy aims. The Commission—like the stations—must accept its duty now. There are many ways in which the policy of Section 504 of the Rehabilitation Act might be implemented. We hold only that it cannot be ignored.

IV. COMMERCIAL STATIONS

A. *Section 504 and Federal Licenses*

Appellants argue that the seven commercial stations involved in this case are also bound by Section 504 of the

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our view, sweeps no more broadly than the public interest standard of the Communications Act, under which we are unprepared to demand a specific, substantive interpretation from the Commission at this time.

Intervenors in this court have also lodged a First Amendment argument on behalf of the licensees: the argument that any captioning requirement the FCC might impose would violate protected rights of the broadcasters by regulating the "content" of their programming. *See* joint brief for intervenors American Broadcasting Companies, Inc.; Golden West Broadcasters; KCOP Television, Inc.; Metromedia, Inc.; National Broadcasting Co.; and RKO General. Inc. at 47-51. We find this argument to be without merit. A captioning requirement would not significantly interfere with program content. And in cases of more limited regulations such as those likely to come in issue it is well established that the Commission may constitutionally condition licenses on a station's provision of programming in the public interest. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-392 (1969); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 226-227 (1943).

Rehabilitation Act, and that the FCC must therefore assess their compliance with the statute in considering applications for license renewal. We are unable to accept this argument in the terms advanced by appellants.

Section 504 directly imposes legal obligations only on recipients of "Federal financial assistance." Appellants correctly argue that a license to broadcast on the public airwaves is a commodity of great value.[55] But this does not resolve the question of congressional intent: Did Congress intend broadcast licenses to count as "financial assistance" within the meaning of Section 504? We are unable to conclude that it did.

The first reason arises from the statute's legislative heritage. Section 504 of the Rehabilitation Act was expressly modeled on Section 601 of Title VI of the Civil Rights Act of 1964.[56] And although the legislative his-

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[55] Appellants cite an article, Levin, *Economic Effects of Broadcast Licensing*, 72 J. POL. ECON. 151 (1964), in which it was estimated, as long ago as 1964, that the average value of a VHF license exceeded $1,500,000. *See* brief for appellants at 33-34. That figure was based on calculations of the difference between the sale price of stations actually sold and the replacement cost of the stations' material facilities. Whatever the actual figure, there can be no doubt that the broadcast licenses contested in this case possess great value. In the Los Angeles market, which comprises approximately 10 million people, the FCC grants only 13 commercial licenses to television broadcasters. And Los Angeles is the most profitable market in the country. *Broadcasting Magazine*, July 30, 1979, at 46-47. *Cf. Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (broadcast license constitutes "valuable privilege"); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, *supra* note 54, 412 U.S. at 174 n.5 (Brennan, J., dissenting) (free license is functional equivalent to "Government subsidization of broadcasters").

[56] *See* S. Rep. No. 93-1297, 93d Cong., 2d Sess., *reprinted at* [1974] U.S. Code Cong. & Ad. News 6373, 6390 ("Section 504 was patterned after, and is almost identical to, the anti-

tory of Section 504 is sparse, we find ample evidence to conclude that Congress did not intend Title VI to reach the recipients of licenses from the FCC. This evidence includes congressional hearings and floor debates, in which various speakers interpreted the language as applying to "funds" [57] and "public moneys out of the Federal Treasury," [58] and none apparently referred to federal licenses.[59] It also encompasses authoritative inter-

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discrimination language of section 601 of the Civil Rights Act of 1964"); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1280 & n.9 (7th Cir. 1977); 119 Cong. Rec. S6144-S6145 (daily ed. March 1, 1973) (remarks of Sen. Humphrey, indicating that § 504 represented substitute for amendments to Title VI to protect the handicapped). Congress reiterated its intent in 1978 when it adopted the Rehabilitation, Comprehensive Services and Development Disabilities Amendments, Pub. L. No. 95-602. Section 120 of the Amendments, § 505(a)(2) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(2) (Supp. III 1979), points explicitly to Title VI as a model for § 504:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section [504] of this [Act].

[57] *See, e.g., Civil Rights: Hearings before the House Judiciary Committee*, 88th Cong., 1st Sess. 2731 (1963) (statement of Attorney General Robert F. Kennedy) ("It is going to be every program of the Federal government where Federal funds are expended.").

[58] *See, e.g.*, 110 Cong. Rec. S6430 (daily ed. March 26, 1964) (transcript of televised remarks of Sen. Humphrey) ("What it merely says is that public moneys out of the Federal Treasury will not be used to promote discrimination * * *.").

[59] Not even opponents of the 1964 Civil Rights Act, who frequently criticized the measure on account of what they considered its excessively broad sweep, *see, e.g., Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, reprinted at* [1964]

pretations of the Civil Rights Act developed by the Attorney General both before and after the measure's passage. In anticipation of the congressional debate Congressman Celler asked the Justice Department to supply a list of federal programs and activities that would fall within the ambit of Title VI.[60] Duly prepared by the Deputy Attorney General, the list that appeared in the Congressional Record of June 10, 1964 included no reference to the FCC or to any other government program involving issuance of federal licenses.[61]

The Justice Department reiterated its interpretation after the Civil Rights Act had become law. Designated to develop interpreting regulations, the Department undertook to aid all affected agencies to formulate standards to implement Title VI. Yet it found no need for the issuance of regulations by the FCC.[62] The Justice Department's contemporaneous construction of the statutory term "Federal financial assistance" deserves substantial weight in this court, both because of the Department's close involvement in the drafting of the Civil Rights Act and because of its status as the agency responsible

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U.S. Code Cong. & Ad. News 2341, 2433 (bill "constitutes the greatest grasp for executive power conceived in the 20th century"), suggested that issuance of a federal license would subject licensees to Title VI. For example, Congressmen Poff and Cramer, who filed separate minority views, listed existing federal programs that "apparently would be embraced." *See Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer, reprinted at* [1964] U.S. Code Cong. & Ad. News 2471, 2471-2472. None of the programs contained on their list involved federal licensing. *See id.*

[60] *See* 110 Cong. Rec. H13380 (daily ed. June 10, 1964).

[61] *See id.* at H13380-H13382.

[62] The Justice Department remains responsible for coordination and implementation of Title VI, *see* Executive Order 11764 (Jan. 24, 1974), 3A C.F.R. 124, and it has at no time issued, or asked the FCC to issue, regulations governing recipients of broadcast licenses.

for "setting the [Act's] machinery in motion." *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (citation omitted); *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 134-135 (1977).

The agencies responsible for implementation of the Rehabilitation Act have followed the pattern of construction established under the Civil Rights Act. They too have regarded broadcast and other licenses as falling outside the statutory meaning of the term "Federal financial assistance." Neither HEW nor the Department of Education has thought it necessary to issue regulations applicable to commercial broadcasters.[63] And regulations

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[63] HEW was charged by Executive Order 11914, 41 FED. REG., 17871 (April 28, 1976), with the task of issuing general regulations for the guidance of all federal agencies providing financial assistance encompassed by § 504. It developed an expansive definition of financial assistance:

> (h) "Federal financial assistance" means any grant, loan, contract * * *, or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:
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> (1) Funds;
>
> (2) Services of Federal personnel; or
>
> (3) Real and personal property or any interest in or use of such property, including:
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> (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
>
> (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

45 C.F.R. §§ 84.3(h) & 85.3(e) (1979). Relying on the breadth of the HEW definition, appellants cite that agency's interpretation in support of their position. *See* brief for appellants at 28-31. Significantly, however, HEW never explicitly classified broadcast licenses as financial assistance, nor did that agency ever issue regulations specifically applicable to commercial broadcast licensees or ask the FCC to do so. The Department of Education, which has now assumed responsibility for issuing interpretive guidelines applicable

issued by the Justice Department, which has recently been designated by Executive Order as the agency responsible for coordinating federal efforts to implement the Rehabilitation Act,[64] hold specifically that federal licensees are not bound by Section 504.[65] We note also that the Justice Department's interpretation accords with the FCC's construction of the Communications Act of 1934, under which licenses are not regarded as establishing property rights,[66] even though licensees do enjoy a limited renewal expectancy.[67]

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to public broadcasters, has given no indication that it regards § 504 as applying to commercial licensees.

[64] *See* Executive Order 12250, 45 FED. REG. 72995 (Nov. 4, 1980).

[65] *See Nondiscrimination Based on Handicap in Federally Assisted Programs—Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914*, 45 FED. REG. 37620, 37632 (June 3, 1980) ("The term 'Federal financial assistance' * * * does not include licenses, for example, since licenses are not Federal assistance grants, contracts, loans, or cooperative agreements."). The Justice Department guidelines were intended to apply only to federally funded programs administered by the Department of Justice. Since their issuance, however, the Department has been designated as the agency primarily responsible for coordinating and implementing federal compliance with § 504. *See* Executive Order 12250, 45 FED. REG. 72995 (Nov. 4, 1980).

[66] *See Reconsideration, supra* note 4, 72 FCC2d at 277, JA 15. The Commission bases its construction on the plain language of the Act, which states expressly that "no [broadcast] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301 (1976). The Supreme Court has also held that Congress intended the Commission's grant of a license to create no property rights. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331-332 (1945); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

[67] *See, e.g., FCC v. Nat'l Citizens Committee for Broadcasting*, 436 U.S. 775, 805 (1978); *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 61 (D.C. Cir. 1978) (*per curiam*) (petition for rehearing).

B. *Public Interest Obligations*

In denying appellants' claim that the FCC committed reversible error in failing to hold the seven commercial stations to specific obligations under Section 504, we are not unmindful that the FCC functions under a statutory obligation to make findings about the public interest, and that the Rehabilitation Act of 1973 may evidence a general national policy of considering the concerns of the deaf within the public interest rubric,[68] even where direct legal obligations are not imposed. Indeed, the FCC itself has sometimes suggested that it could not, consis-

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[68] *Cf.* text and notes at notes 48-52 *supra; Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC2d 766, 769 (1968):

> There is [a] National policy against discrimination in hiring. And here we note that this is a National policy. The 25-employee prescription in the Civil Rights Act does not limit that National policy, and specifically, "title VII was not intended to circumscribe the authority of Federal agencies other than the Equal Employment Opportunity Commission to regulate employment practices." (See letter of Assistant Attorney General Pollak, app. A, pp. 2-3.) Second, there is the consideration that broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license. When these two considerations are taken together—the National policy against discrimination and the nature of broadcasting—we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the National policy. In this respect—a mass media service to the public which is based entirely on a Federal license under a public interest standard—the situation clearly parallels the Federal policy in contract awards. * * *

tent with its statutory mandate, ignore the wants and needs of minorities that national policies aim to protect.[69]

Because of the national policy of extending increased opportunities to the hearing impaired, we believe that some accommodations for the hard of hearing are required of commercial stations, under the general obligation of licensees to serve "the public interest, convenience, and necessity." But in the absence of specific statutory obligations directed at the commercial broadcasters,[70] we conclude that it would not be appropriate for us to delineate standards for the commercial stations or to require specific Commission procedures at this time.

In its brief in this court the Commission rehearses a series of efforts that it has encouraged and licensed from 1970 to the present.[71] It represents that it is moving

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[69] *See The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 FCC2d 917, 919 (1970) (expressing concern about needs of hearing impaired and noting that if stations do not voluntarily provide better service "it may be necessary to begin rule making looking toward the adoption of minimum requirements"); *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC2d 766, 769 (1968) (*quoted in* note 68 *supra*).

[70] In its *Notice of Intent to Develop Regulations*, *see* note 22 *supra*, the Department of Education seems to hold open the possibility that at least some commercial stations may air programs that are produced with federal assistance, and that they may therefore be subject to statutory obligations under § 504 of the Rehabilitation Act. *See* 46 FED. REG. 4954, 4955 (Jan. 19, 1981). Because receipt of assistance of this kind has not been alleged as a basis for the existence of statutory obligations in this case, no such issue is before us. We hold only that broadcast licenses do not by themselves constitute "Federal financial assistance" within the meaning of § 504.

[71] Brief for appellee at 3-6. Some of the Commission's efforts are described at notes 12-19 *supra* and accompanying text.

forward in this area, and that it will continue to do so.[72] Recognizing that the Commission possesses special competence in weighing the factors of technological feasibility and economic viability that the concept of the public interest must embrace,[73] we defer today to its judg-

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[72] The Commission has expressed especially high hopes for the closed captioning program initiated in March 1980, pursuant to which PBS, NBC, and ABC are making available approximately 20 hours of "closed captioned" programming per week. *See Reconsideration, supra* note 4, 72 FCC2d at 281, JA 19:

> [W]e are satisfied that important advances are being made toward achieving the goals which petitioners espouse and which we share—namely, the access of the aurally handicapped to the medium of television. We expect that the closed captioning project will be a success. However, if at a later date it is demonstrated that the project is not successful in making television programming more available and enjoyable to the hearing impaired, then it may be necessary for the Commission to determine if a rulemaking is warranted to ensure that the hearing impaired are not deprived of the benefits of television.

(Footnote omitted.) The Commission made similar representations in oral argument before this court.

[73] In the analogous case of establishing compliance guidelines for public stations under § 504, the Department of Education has asserted that at least the following factors must be taken into account: (1) costs of making broadcasting available to the hearing impaired; (2) alternative ways of distributing any costs incurred; (3) possible standards other than a requirement that all programming should be accessible to the hearing impaired; (4) attitudes of the general public toward open captioning and cameo signing; (5) the state of existing technology. *See* "Declaration of Cynthia G. Brown, Assistant Secretary for Civil Rights, Department of Education," accompanying Defendants' Motion to Modify Order of March 20, 1980, *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California, d/b/a KCET-TV*, Civil No. 78-4715-R (C.D. Cal.).

ment. However, should the Commission fail to fulfill its obligations to the nation's hearing impaired minority, as we have indicated above,[74] judicial action might become appropriate at a later date.

In consideration of the Commission's representations of good faith and active concern, together with the record on which it based its decisions to renew the licenses of the seven commercial stations, we conclude that the action of the Commission with respect to the commercial broadcasters should be affirmed.

V. Conclusion

For the reasons stated in this opinion, those portions of the Commission's order denying appellants' application to deny license renewal to public station KCET-TV are vacated and remanded to the Commission for further proceedings, and those portions of the order that concern the seven commercial stations are affirmed.

So ordered.

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[74] *See* discussion at pp. 4, 14-15, 34-35 *supra*.

McGOWAN, *Chief Judge, concurring in part and dissenting in part*: Petitions to deny renewal of license were filed in this case with respect to seven commercial television stations, and one non-commercial public educational licensee, in the Los Angeles area. The opinion for the court affirms the FCC's action in disallowing such petitions—and renewing the licenses for the maximum permissible term—in the case of the seven commercial licensees. I concur in that result, but in doing so I cannot be unaware of the vastly different burden imposed on the educational station by reason of the court's remand for hearing of the petition to deny directed to the renewal of its license.

The licensing period in question, by reference to which renewals were sought, is the same for each of the eight stations, namely, 1974 to 1977. The differing treatment by this court of the petitions to deny renewal beyond that period results because of the court's holding that the non-commercial station, KCET-TV, is receiving financial assistance from the federal government within the meaning of § 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357, *as amended*, 29 U.S.C. § 794 (1976), whereas the seven commercial stations are not. Although the court expressly states that, by reason of the "public interest" standard contained in the Federal Communications Act, it does not regard the latter stations as home free from licensee renewal challenges in the future from representatives of the hearing-impaired, it expressly notes that rulemaking, as distinct from license renewal proceedings, "might be a better, fairer, and more effective vehicle for considering how the broadcast industry is required to provide the enjoyment and educational benefits of television to persons with impaired hearing."

I agree, but I would not, in disposing of this case, limit that principle to commercial stations. It also com-

ports with the steps that have been taken to implement § 504 of the Rehabilitation Act. The Executive Branch of the Government, generally charged by the Constitution with enforcement of laws enacted by Congress, in 1976 assigned the responsibility for developing compliance standards for § 504 to the Department of Health, Education, and Welfare. The Department at length concluded that § 504 was applicable to non-commercial broadcast licensees, and it directed that its Office of Civil Rights develop compliance standards for such licensees. Under the Department of Education Reorganization Act, Pub. L. No. 96-88, 93 Stat. 691 (1979), the newly-created Department of Education took over that responsibility; and the HEW study group involved in preparing compliance guidelines for public TV licensees was transferred to it.

On January 19, 1981, the Department of Education issued a Notice of Intent to Develop Regulations relating to the rights of access of the hearing-impaired to television programs, 46 Fed. Reg. 4954, inviting comments by March 5, 1981.[1] The Federal Communications Commission represents that, when such guidelines become available, it stands ready to take them fully into account

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[1] In addition to seeking denial of license renewal by the FCC, appellants have been simultaneously pursuing a suit in the United States District Court for the Central District of California seeking (1) to enjoin KCET-TV from broadcasting any program that is not open-captioned and (2) to cut off the distribution of federal funds to KCET-TV. Civil No. CV-78-4715-R (C.D. Cal.). The District Court after trial, on March 20, 1980 ordered the Department of Education to issue final regulations not later than November 17, 1980. The District Court on November 24, 1980 modified its order so as to enlarge the time until February 17, 1981. The Court of Appeals for the Ninth Circuit, on December 19, 1980, stayed the order as modified pending appeal. It also directed the appeal to be expedited, and calendared for hearing as soon as practicable after the appellee's brief is filed.

in subsequent license renewal proceedings. And obviously the relevance of such guidelines in defining "the public interest" in the case of commercial license renewals will be very great indeed, even if they should be confined in terms to non-commercial stations.

Pending the issuance of such guidelines, I do not see why the benefits of their prospective operation should not extend to all licensees seeking renewal, commercial and non-commercial alike. Although it may be true, as we hold today, that the "financial assistance" from the Federal Government contemplated by the Congress in the Rehabilitation Act does not comprehend the existing free use of the publicly-owned airwaves by all licensees, form is favored over substance when commercial stations are, for this reason, spared the expense and uncertainty of renewal hearings, and a non-commercial station is not. Neither, on the record before us, had advance notice during their expired license terms of what was, and therefore could reasonably be, expected of them with respect to the wholly laudable, but technically complex, objective of providing access for the hearing-impaired.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re
License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles, California

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MEMORANDUM OPINION AND ORDER

(Adopted: August 8, 1978; Released: September 8, 1978)

BY THE COMMISSION: COMMISSIONER WASHBURN ABSENT.

1. The Commission has before it for consideration individual petitions to deny the 1977 renewal applications of eight television stations licensed to Los Angeles, California,[1] filed by Sue Gottfried individually and on behalf of the deaf and hearing impaired population within the stations' service areas as well as other organizations and individuals.[2]

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[1] *See* Greene County Planning Bd. *v.* FPC, 559 F.2d 1227, 1237 (2d Cir. 1977) *(En banc)*, *cert. denied*, 434 U.S. 1086, 98 S. Ct. 1280 (1978) *reaffirming* Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

[2] The petitions set forth that Ms. Gottfried is joined by the Greater Los Angeles Council on Deafness, Inc. (GLAD) and its component organization; California Association of the Deaf, Long Beach Chapter; California Association of the Deaf, Riverside Chapter; California Association of the Deaf, San Fernando Valley Chapter; California State University, Northridge; CSUN Jewish Outreach; Children's Hear-More Institute; D.E.A.F. Media, Inc., Southern California Branch; Ear Research Institute; East Los Angeles College, Special Education; El Camino College, Special Education; Ephpheta Society of the Deaf; First Baptist Church of Van Nuys; Golden West College, Hearing Impaired Program; Greater Los Angeles Deaf Women's Bowling Association; Hebrew Association of the Deaf; John Tracy Clinic; La Fiesta Club of the

2. Except for some additional allegations made specifically against Station KCET-TV, the petitions are identical.[3] As basis for the renewal challenges, it is contended that the licensees' ascertainment efforts were defective especially as to the deaf and hearing impaired community, their past programming did not meet the needs of the deaf population, and the stations violated federal law — i.e., Section 504 of the Rehabilitation Act of 1973 — in not offering programming understandable to the aurally handicapped.

3. The licensees, in opposition, urge that the pleadings directed against their renewals be dismissed because of their failure to comply with the applicable statutory requirements so as to qualify as petitions to deny. They contend that the pleadings do not contain specific allegations of fact to demonstrate that petitioners are parties in interest or that a

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Deaf; La Puente Valley Vocational Center; Little Company of Mary Hospital, Audiology Center; Long Beach Club of the Deaf; Los Angeles City Schools, Special Education Division; Mental Health Program for the Deaf, Saint John's Hospital; Metropolitan Cooperative Library System; Newcastle School, Hearing Impaired Parent Group; Pasadena City College; Photo-Schools Films, Inc.; Pilgrim Lutheran Church of the Deaf; Pilgrim Tower; San Gabriel Valley Club of the Deaf; Santa Ana Guild for the Deaf; Selaco-Downey High School; Southern California Registry of Interpreters for the Deaf; Southern California Ski Club for the Deaf; Southern California Women's Club of the Deaf; Southwest Oral Deaf Adults; Temple Beth Solomon of the Deaf; and Valley Seniors Club of the Deaf; and several hundred area residents who signed petitions against each of the licensees which were consolidated into the applicable petition. These "petitions" were actually phrased as informal objections and included basically the same ascertainment and programming allegations made in the Gottfried pleading. Subsequent to the filing of the petitions, other copies of the same objection were submitted with additional residents' signatures.

[3] Other than the KCET-TV petition, the pleadings against the licensees vary only as to the number of appendicies and the number of signatures thereon.

grant of the renewal applications would not be in the public interest. The licensees further assert that the several hundred individual signers did not supply requisite affidavits nor did GLAD or any of its listed component organizations. Also, according to exhibits supplied by several licensees, some of the component organizations formally disavowed any association with the petition.[4] While acknowledging that Ms. Gottfried submitted an affidavit in support of the petition, it is contended that she failed to establish herself as a party in interest by either representing that she is a resident of the community or a listener or viewer of the stations involved. Finally, licensees contend that Gottfried has not alleged in her affidavit that she has personal knowledge of the facts set forth in the pleadings.

4. In response to the oppositions, Gottfried submitted another affidavit wherein she set out her residence as being within the service area of the challenged facilities and points out that because of her deafness she is unable to hear or understand television. Additionally, the reply contained an affidavit from Marcella M. Meyer, GLAD's Executive Director, which stated that she is "personally familiar with all of the organizations listed in the Petition, and each of them is directly interested in the problems of the deaf and hearing impaired." However, her affidavit does not support Gottfried's contention that the forty component organizations of the GLAD umbrella formally back the petition and should be considered petitioners. Moreover, it does not even serve to establish GLAD as a petitioner or informal objector.[5]

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[4] The John Tracy Clinic, Pasadena City College, and California State University, Northridge, formally notified the licensees that their institutions had not authorized participation in the renewal challenges.

[5] The only indication we have that GLAD wanted to participate in a challenge of the eight licensees came in an October 14, 1977, letter to the Commission from the president of GLAD, Leonard J. Meyer. Therein he stated that the umbrella organization "has

5. The requirements for petitions to deny as mandated by Section 309(d)(1) of the Communications Act of 1934, as amended, are that the petitioner must set forth specific allegations of fact to show that they are parties in interest and that a grant of the renewal application would not be in the public interest. Such allegations must be supported by affidavit of a person or persons with personal knowledge of such facts.

6. What we have before us is one timely-filed affidavit which does not establish standing and one late-filed affidavit that would serve to satisfy the defects of the initial one. Although the licensees have characterized these pleadings as "blanket" petitions, we believe that a good-faith effort has been made by Gottfried to comply with our procedural rules and, therefore, we will accept the second affidavit *nunc pro tunc*. See *Meyer Broadcasting Co.*, 20 FCC 2d 532 (1969). However, Ms. Gottfried is the only party who qualifies as a petitioner. Those members of the public who signed the numerous petitions that were filed with the Gottfried pleadings and subsequent thereto will be considered as informal objectors pursuant to Section 1.587 of the Commission's Rules and Regulations. Because of the uncertainty of GLAD's intentions in this matter, we will not consider it or its component organizations as participating herein.

7. As noted above, while filed individually against each of the eight licensees, the separate pleadings before us are virtually identical. The licensees urge that the "blanket" nature of the petitions fails to supply a sufficient degree of specificity to warrant any Commission consideration. We must agree with the licensees as to most of the allegations and they will be summarily disposed of below. On the other hand, we feel that certain of the allegations, in light of our often stated concern for the deaf and hearing impaired's involvement in television, should be explored herein.

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authorized Mr. Abraham Gottfried to represent us in filing an objection to the renewal of licenses" of the Los Angeles Television stations. Mr. Gottfried is the husband of Sue Gottfried and the attorney who assisted in the filing of the petitions.

The FCC and the Hearing Impaired

8. Before discussing the merits of the challenges, we believe that a brief background discussion of the Commission's actions regarding television licensees and the nation's hearing impaired would be helpful.

9. In 1970, the Commission issued a Public Notice that was distributed to all television licensees advising them of the special needs of the hearing impaired regarding information concerning emergency situations as well as news, information, and entertainment programming. *The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 FCC 2d 917 (1970). Pointing out that radio provided an important service to the visually handicapped, the Commission noted how well suited television is to provide a similar service to the deaf and hearing impaired. Accordingly, it was suggested that television stations could make use of visual as well as oral announcements of emergencies, utilize the fact of newscasters wherever possible so as to permit lip reading, and feature visualization of materials in news, weather, and sports programs. The Commission hoped that the notice would alert licensees to our concern for the needs of the hearing impaired citizen and make television a truly valuable medium for that segment of the population — estimated by the Department of Health, Education, and Welfare to include 13.4 million persons. We observed, however, that "it may be necessary to begin rule making looking toward the adoption of minimum requirements."

10. In 1972, the Commission granted authority to the Public Broadcasting Service (PBS) to begin experimentations in "closed" captioning utilizing the vertical blanking space of Line 21 of the television broadcast signal. Through the use of an encoder at the transmitting end and a decoder at the receiving end, this closed captioning system could supply visual information — captioning — of the aural portion of the television program to those hearing impaired persons whose television sets were equipped to receive the captioned

information while the rest of the viewing public would receive the normal visual and aural transmission. This differs from "open" captioning utilized, for example, by PBS in its rebroadcast of the *ABC Evening News*. Open captioning is transmitted to all viewers who see a printed display of the text of the aural transission at the bottom of the visual transmission.

11. Other than the PBS experiment, progress in providing a more viable information medium for the hearing impaired was disappointing. As a result of their experiment, PBS filed a Petition for Rulemaking (RM-2616) requesting an amendment of Subpart E of Part 73 of the Commission's Rules and Regulations to provide that Line 21, Field 1, and the available half of Line 21, Field 2, of the television vertical blanking interval be reserved for the transmission of captioned information for the deaf. Prior to the adoption of a report and order in that proceeding — Docket 20693 — we adopted Section 73.675 of our rules which requires television licensees to broadcast emergency information both aurally and visually or only visually. *Amendment of Part 73 of the Rules to Establish Requirements for Captioning of Emergency Messages on Television*, 61 FCC 2d 18 (1976), *recon. granted*, 62 FCC 2d 565 (1977).

12. In concluding Docket 20693 in 1976, the Commission determined that there were too many unanswered questions — technical and financial — and that at least for the present the proper approach in the matter was to not reserve Line 21 for the exclusive use of closed captioning of information for the deaf but to permit such captioning. *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf*, 63 FCC 2d 378 (1976). Further, the Commission expressed the belief "that licensees can and will be responsive to the needs of its viewers, but it is still the responsibility of each licensee to determine how it can most effectively meet those needs." Thus, there is no requirement that any television licensee —

commercial or non-commercial — provide open or closed captioning or any other form of special visual program material other than for broadcasting emergency information.

Ascertainment

13. Generally, petitioner asserts that none of the licensees followed Commission requirements to conduct continuous ascertainments of the community's problems, needs, and interests nor did any of the licensees utilize principals or management level employees at least 50% of the time in conducting the community leaders survey. However, no support is offered and, in view of the general nature of the allegations, we need not consider them further. Similarly, we note that despite Ms. Gottfried's contention to the contrary, there is no requirement in *Ascertainment of Community Problems by Broadcast Applicants (Renewal Primer)*, 57 FCC 2d 418 (1976), *Ascertainment of Community Problems by Noncommercial Broadcast Applicants, Permittees, and Licenses (Noncommercial Primer)*, 58 FCC 2d 526 (1976), or elsewhere that demographic data relating to an area's hearing impaired population need be included in a renewal application with a station's ascertainment information.[6]

14. Additionally, it is urged that each of the stations failed to evidence a general public survey but, if any were completed, they did not include the hearing impaired. Licensees are only required to place the results of the com-

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[6] Previously, under the *Primer on Ascertainment of Community Problems by Broadcast Applicants (Primer)*, 27 FCC 2d 650 (1971), commercial licensees were required to compile and submit a compositional survey of their community. In its place, the *Renewal Primer* requires only the maintenance in the public file of a listing of the demographic aspects including total population figures and numbers and proportions of males, females, minorities, youth, and the elderly. Similarly, noncommercial television stations under the *Noncommercial Primer* are only required to place such demographics in their public file.

pleted public survey in the station's public inspection file and certify that fact on the renewal application. We have no indication that this procedure was not followed. Furthermore, public surveys are to reflect randomness. While totally telephonic public ascertainments might well miss the deaf and hearing impaired, a survey employing such random sample techniques would satisfy our ascertainment requirements.

15. More specifically, Gottfried contends that none of the challenged licensees interviewed community leaders who represent the interests of the deaf and hearing impaired and, thus, the needs of that segment of the population have not been ascertained.

16. It is through the process of ascertaining community leaders that a broadcast licensee arrives at the problems, needs, and interests of its community. The Community Leader Checklist formulated by the Commission in the *Renewal Primer* and *Noncommercial Primer* and filed at renewal by each nonexempt licensee contains 19 specifically identified community elements or institutions as well as one "other" category. It is by continually ascertaining leaders of the elements so set forth in the checklist that a licensee meets the requirement that its ascertainment efforts constitute a representative cross-section of those who speak for the interests of the area served by the station. Neither the deaf and hearing impaired nor the physically handicapped in general constitute a separate checklist category. The licensee has the option, however, to include under the "other" category leaders in elements not found on the checklist that it determines to be significant. We should emphasize that recently the Commission addressed the petitioner's concern — one shared by other groups — that despite their significance in the community they are excluded from ascertainment because they are not set out as one of the 19 elements. Thus, in adopting the notice of proposed rule making in *Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants in Regard to the Community Leader Survey*, Docket No. 78-237, FCC 78-583, released August 8,

1978, we are proposing that licensees be obligated to seek out "other" accessible groups in the community that do not appear on the checklist. Therefore, in this instance, failure to include representatives from the aurally handicapped segment of society would not, in and of itself, discredit an ascertainment. Importantly, however, the licensees herein ascertained leaders from the health, welfare, and elderly elements of the community. Further, most of the licensees in their oppositions noted that these elements included leaders who are involved with the whole range of concerns of the physically handicapped which includes the deaf and hearing impaired. Moreover, several of the licensees ascertained representatives from GLAD and other groups identified by Gottfried as constituting persons aware of the problems of the aurally handicapped.[7]

Programming

17. Gottfried alleges that during the past license term each of the licensees failed to offer programming directed at the special needs of the hearing impaired. Furthermore, she urges that the stations' public inspection files do not reflect any annual listing of problems-programs relating to the hearing impaired.

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[7] The community leader ascertained by the licensees included: Marcella M. Meyer, Executive Director, GLAD, interviewed by KABC-TV and KCET-TV; L. Ronald Jacobs, Head of Student Personnel, Campus Services for the Deaf, California State University, Northridge, California, interviewed by KABC-TV; Lenny Meyer, Present of GLAD, and James K. Riley, Chairman, Youth Forces of GLAD, contacted by KCET-TV; Dr. Edgar L. Lowell, John Tracy Clinic, interviewed by KTTV; Dennis Landesman, President, Children Hear More Institute ascertained by KTLA-TV. In addition, KABC-TV interviewed Father George Doran, Los Angeles Director, Deaf CCD Projects, KNBC-TV contacted Sarah McDonald, Director of Inglewood Hearing and Speech Center, and KHJ-TV ascertained Ms. Dottie Soltis, Directors of Interpreters, La Trade Tech College.

18. Regarding the annual problems-programs listings, Sections 1.526 and 1.527 of the Commission's Rules and Regulations require commercial and non-commercial television licensees to place annually in their public inspection file a list of not more than ten significant problems that were served by the station during the preceding 12 months and the programs offered in response to those problems. There is no requirement that a station program in response to every ascertained need or that it itemize every ascertained need. Thus, the absence of any particular need does not, without more, serve to question a licensee's programming efforts.

19. In order to warrant a hearing on a licensee's past programming, a challenger must plead specific facts which give rise to a substantial and material question as to whether a licensee abused its discretion in its selection of programming matter to serve the needs and problems of its community of license. Here, petitioner would have us reach that conclusion against all the licensees based solely on her contention that the stations did not offer specific programs directed at the hearing impaired.

20. Our review of the licensees' renewal applications and oppositions reveals numerous programs aired during the past license period *about* the deaf and hearing impaired. Few, however, were *for* the hearing impaired.[8] Apparently, it is this

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[8] For instance, KTLA-TV relates that it attempts, whenever possible, to supplement its programming with visual materials: News — maps used to locate stories, text of testimony in court cases is visually depicted, color slides used to characterize story, and close-ups of newscasters permit lip reading; Weather — visual depiction of forecast and conditions as well as utilization of visual weather symbols; and Sports — visual display of scores, standings, and time remaining. Another station, KTTV, offered a sign language portion of its daily prime-time news program for four-and-one-half years. Presently, the station visually captions a special summary of the news. In addition to the *Captioned ABC News*, KCET has offered PBS programs that have provided visual assistance for the aurally handicapped.

point that the challenger is really raising. Over the past decade, broadcasters, in response to an ascertained awareness of special needs of their community's minority and ethnic populations, have been offering programs not only *about* but also specifically *for* such groups. Generally speaking, such programming can be achieved without any additional production techniques other than those utilized for regular programming. Obviously, that is not the situation confronting a licensee who might wish to program for the aurally handicapped. For such programming to be effective, it must offer some specific form of visual communication: sign language interpretations, captioning, or extensive utilization of charts, signs, and facial closeups to permit lip reading. Even sign language and lip reading efforts, according to Gottfried, serve to limit the number of deaf and hearing impaired since many do not effectively understand these methods. As noted earlier, there is no Commission requirement for such specialized programming techniques and, accordingly, there is no basis to fault a licensee for failure to provide these options for the deaf and hearing impaired in the station's service area. Therefore, we fail to find that a substantial and material question has been raised.[9]

Section 504 of the Rehabilitation Act

21. The aurally handicapped population of Los Angeles is excluded from participation in and denied the benefits of television and, thus, according to Gottfried, the licensees

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[9] In addition to the programming allegations previously discussed, petitioner contends that KCET-TV refused until May 23, 1977, to begin airing the *Captioned ABC News* despite its availability from PBS and that when it did begin to air the program, it was scheduled at the inappropriate time of 11:30 P.M. Programming decisions as to what to air and when to air it are discretionary matters normally left to the licensee. It is only where an abuse of such discretion has been shown that the Commission questions a licensee's programming or scheduling. We have not been presented any supportive evidence to indicate such an abuse by KCET-TV.

herein have been and continue to violate Section 504 of the Rehabilitation Act of 1973. In this regard, the challenger contends generally that seven of the licensees receive an unidentified amount of federal financial assistance while at the same time discriminating against the deaf and hearing impaired which is prohibited by Section 504. Further, she avers specifically that non-commercial KCET-TV receives 30% of its funding from federal grants yet does not provide the required service to the deaf and hearing impaired.

22. The section in question, "Nondiscrimination Under Federal Grant," Title 29, United States Code, Section 794, states that no handicapped person shall be excluded from participation in, be denied the benefits of, or be subjected to, discrimination under any program or activity which receives federal financial assistance. We find merit to the argument raised in the oppositions concerning the applicability of this law to commercial broadcast licensees and, therefore, fail to see how this section applies to the seven commercial licensees now before us. While non-commercial KCET-TV — which apparently receives federal grants — might fall within the purview of the Rehabilitation Act and a violation thereof would be a matter to be considered by the Commission, petitioner has not indicated that the Department of Health, Education, and Welfare — the proper governmental agency to consider such matters — either has made such a determination or has even been asked to make such a determination. Thus, there is no reason to consider this allegation further against any of the licensees. However, in the event some adverse finding were to be made relative to Section 504, the Commission would take whatever action would be appropriate.

Conclusion

23. It is clear from the above discussion that there is no legal basis to the challenges against the eight television stations. However, the Commission is extremely sensitive to the concern that Ms. Gottfried personally has expressed and that she undoubtedly shares with the objectors and the country's

hearing impaired. For them, television is not a viable means of communications. At present, neither the Communications Act nor our rules and regulations provide a solution for this segment of society. Hopefully, resolution of some of the unanswered questions prevalent in Docket 20693 and technological advances will both serve to ameliorate the situation.

24. Programs such as the captioned news on PBS aid the aurally handicapped citizen in being linked with the nation; however, few licensees provide a similar link with the local community. Therefore, we urge all television licensees to review the options presently available that, within reason, might provide some of the benefits of the medium of television for this nation's hearing impaired.

25. We must conclude, however, that Ms. Gottfried and the informal objectors have failed to allege specific facts which raise any substantial or material question as to whether a grant of the renewal applications before us would serve the public interest, convenience, and necessity. While we are able to make the necessary statutory finding of Section 309 of the Communications Act of 1934, as amended, to grant renewals of license to KNBC-TV, KNXT-TV, and KTLA-TV, due to various matters still pending before the Commission, the other five stations can not be renewed at this time.

26. Accordingly, IT IS ORDERED, That the petitions to deny the 1977 license renewal applications of the eight Los Angeles, California, television stations, identified in footnote 1, filed by Sue Gottfried, the Greater Los Angeles Council on Deafness, Inc., and its component organizations, and several hundred residents of the stations' service area ARE DISMISSED as to all but Sue Gottfried.

27. IT IS FURTHER ORDERED, That the petitions filed by the area residents are considered as informal objections.

28. IT IS ALSO ORDERED, That the petitions to deny and the informal objections ARE DENIED.

29. IT IS ALSO ORDERED, That the application for renewal of license for Station KNXT-TV, Los Angeles, California, IS HEREBY GRANTED for a short-term — until August 1, 1979 — pursuant to the Commission's By Direction Letter of July 12, 1978, FCC 78-506, subject to the condition imposed in *CBS Inc.*, 57 FCC 2d 505(1976).

30. IT IS ALSO ORDERED, That the application for renewal of license for Station KNBC-TV, Los Angeles, California, IS HEREBY GRANTED subject to the conditions imposed in *National Broadcasting Company, Inc.*, 56 FCC2d 411(1976).

31. IT IS ALSO ORDERED, That the application for renewal of license for Station KTLA-TV, IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO,
Secretary.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re
Petition for Reconsideration of Commission's Action in License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles, California

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Memorandum Opinion and Order

(Adopted: May 29, 1979; Released: June 15, 1979)

BY THE COMMISSION: COMMISSIONER JONES NOT PARTICIPATING

1. The Commission has before it a petition requesting reconsideration of its Memorandum Opinion and Order, released September 8, 1978, [69 FCC 2d 451 (1978)], filed by Sue Gottfried, individually and on behalf of the deaf and hearing impaired population within the stations' service areas,[1] and the Greater Los Angeles Council on Deafness, Inc. [hereinafter referred to as GLAD]; oppositions to that petition filed by the respective licensees; and petitioners' responses to those oppositions.[2]

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[1] The stations, licensees, and file numbers involved are: KABC-TV, American Broadcasting Companies, Inc., BRCT-61; KCET-TV, Community Television of Southern California, BRET-80; KCOP-TV, KCOP Television, Inc., BRCT-102; KHJ-TV, RKO General, Inc., BRCT-58; KNBC-TV, National Broadcasting Company, Inc., BRCT-81; KNXT-TV, CBS, Inc., BRCT-139; KTLA-TV, Golden West Broadcasters, BRCT-100; and KTTV-TV, Metromedia, Inc., BRCT-64. Station KHJ-TV had not filed a renewal application as it was in hearing status (Dockets 16679 and 18759); however, it did file an opposition to the petition to deny.

[2] The Commission also has before it a Supplement to Petition for Reconsideration, filed October 30, 1978, and a Second Supplement to Petition for Reconsideration filed November 20, 1978. While

Background

2. Petitioners filed petitions to deny the subject stations' renewal applications alleging that their ascertainment efforts were defective as to the deaf and hearing impaired community, their past programming had not met the needs of that segment of the population, and the licensees had violated Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] by their failure to offer programming understandable to the aurally handicapped.

3. The Commission's September 8, 1978, Order denied those petitions. In so doing we granted standing to petitioner Gottfried but denied it to GLAD and its component organizations. The Order found that the subject licensees had violated no Commission requirement in their ascertainment efforts as we have no requirements that stations specifically ascertain the needs of the deaf or supply demographic data relating to an area's hearing impaired population.[3] With regard to programming, we found that petitioner had failed to raise a substantial and material question as we have no requirement that

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neither of those pleadings are authorized by Section 1.45 of the Commission's rules, we will consider the allegations contained therein.

[3] We did note, however, that licensees have the option of ascertaining the needs of that segment of the community as an "other" checklist category and that these licensees had ascertained leaders in the health, welfare and elderly elements of the community and, in many cases, had included leaders involved with the concerns of the physically handicapped, including the deaf and hearing impaired. We have recently proposed to amend the *Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants* with respect to the "other" checklist category to require licensees to consult with any element or institution which is significant in their communities even if it is not one of the nineteen checklist categories. *In the Matter of Amendment of the Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants in Regard to the Community Leader Survey*, 69 FCC 2d 1815 (1978).

stations utilize special captioning techniques for the hearing impaired. Finally, we rejected petitioners' contention that the licensees had violated Section 504 of the Rehabilitation Act as it does not appear that this Section applies to commercial broadcast licensees. While Section 504 appears to apply to KCET-TV, petitioner had failed to show that the appropriate agency, the Department of Health, Education and Welfare, had been asked to make, or had made, a determination that KCET-TV had violated the Section.

4. On reconsideration, petitioners assert that because nondiscrimination against the handicapped is a national policy, the Commission must find that a failure by these licensees to observe that policy contravenes the public interest, and requires the denial of their renewal applications. Petitioners additionally resurrect the argument that Section 504 of the Rehabilitation Act of 1973 is applicable and has been violated by the subject licensees. GLAD alleges that KCET-TV receives direct subsidies from the Federal government, and the commercial licensees are within the purview of this statute because they or their "parent organizations," do business with the Federal Government. Petitioners claim that the licensees' business contracts with the Federal Government are a matter of record in the Commission's own files. Petitioners argue that the licensees' failure to do anything to meet the needs of some 14 million deaf and hearing impaired citizens, in the face of national policy and Commission concern to the contrary, contradicts any finding that the public interest would be served by the renewal of the subject licenses. Additionally, petitioners contend that the Commission, in its Order, failed to make a factual, or legal, finding that the grant of the applications of the three stations granted renewal would serve the public interest, convenience and necessity.

5. With regard to GLAD's standing, petitioners claim that the affidavit submitted by Marcella M. Meyers, GLAD's Executive Director, contained sufficient specific allegations to demonstrate that GLAD was a party in interest, and, because a majority of GLAD's component organizations supported

the petition, the organization's bylaws provide that all its members bound by that vote.[4]

6. With regard to ascertainment, petitioners assert that the Commission "lumped" the ascertainment efforts of the licensees and thereby gave credit to stations which did not conduct a survey along with those that did. Petitioners likewise dispute our conclusion that the licensees' failure to provide specialized programming for the deaf and hearing impaired did not warrant further inquiry on our part. The basis of petitioners' objection regarding this issue is that the techniques for such programming are currently available and would not, contrary to what we had stated, differ from production techniques utilized for regular programming. Petitioners state that "idiot cards" could be used to supply captions and, since they are already in use, would not require any additional production efforts. Additionally, petitioners contend that special production techniques and equipment are

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[4] When the original petitions to deny were filed by petitioners herein, they lacked affidavits from GLAD or any of its component organizations. Additionally, petitioner Gottfried, who did submit an affidavit, did not state that she was a resident of the community or a listener or viewer of the stations involved. Moreover, the licensees and the Commission received letters from several of the component organizations of GLAD indicating that they did not wish to join in the petition to deny. In response to the licensees' oppositions which took note of the above, Gottfried submitted another affidavit wherein she set out her residence as being within the service area of the challenged stations. Additionally, she submitted an affidavit from Marcella M. Meyer, GLAD's Executive Director, which stated that she was familiar with all of the organizations under the GLAD umbrella and that they were each directly interested in the problems of the deaf and hearing impaired. That affidavit, however, neither supported Gottfried's contention that the component organizations of GLAD backed the petition nor established GLAD itself as a party in interest. Accordingly, the Commission did not treat GLAD or its component organizations as petitioners but limited that status to Sue Gottfried, individually.

already used for other minorities such as separate make-ups and make-up techniques for black and white actors.

7. Petitioners' supplementary pleadings raise two new issues. In the first supplement, petitioners state that Public Broadcasting System stations aired a program entitled "From Paris With Love: An Evening of French Television," in July, 1978. That program included subtitles in English and petitioners state that PBS found as a result of this broadcast that viewers were not adverse to watching captioned programming. The second supplement alleged that the Commission has violated its obligations pursuant to Executive Order 11914 and Part 85 regulations adopted by HEW to implement Section 504 of the Rehabilitation Act. Petitioners state that it was incumbent upon the Commission to issue regulations to enforce Section 504 of the Rehabilitation Act no later than June 15, 1978, and, having failed to do so, it should now grant reconsideration and order hearings on the subject applications.[5]

Discussion

8. As an initial matter, we note that nearly all of the issues asserted by petitioners in support of their request for reconsideration were raised in petitioners' challenges to the renewal of the subject licenses.[6] It is well established that:

> ". . . reconsideration will not be granted merely for the purpose of again debating matters on which we have

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[5] We have also reviewed the oppositions filed by the licensees and the petitioners' response thereto. However, these pleadings are not separately discussed herein. Suffice it to say that the licensees contend that petitioners are merely reasserting contentions already rejected by the Commission and petitioners respond by denying the same.

[6] We also note that some of these allegations have been raised against the Commission and others by the instant petitioners in a case in the United States District Court for the Central District of California. *Greater Los Angeles Council on Deafness, Inc.* v. *Community Television of Southern California d/b/a KCET*, case No. CV-78 4715 R.

already deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685 (1964), aff'd *sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 842 (D.C. Cir. 165), *cert. denied*, 383 U.S. 967 (1965).

However, while it is not necessary that we discuss in detail allegations which we have previously ruled upon, we will, under our public interest mandate, in this instance, consider and discuss petitioners' arguments including those which had previously been raised in their petitions to deny.

9. *Section 504 of the Rehabilitation Act of 1973, as amended.* As we noted in our Order, released September 8, 1978, it was, and remains, our belief that Section 504 of the Rehabilitation Act does not apply to commercial broadcast licensees. That statute clearly applies to, "program(s) or activit(ies) receiving Federal financial assistance or . . . program(s) or activit(ies) conducted by any Executive agency or the United States Postal Service." Because the Commission is neither an Executive agency nor the United States Postal Service, the Act can only apply to its licensees if they are receiving "Federal financial assistance."

10. The Department of Health, Education, and Welfare has defined that term in its regulations. According to 45 C.F.R. §85(e), the term "Federal financial assistance," includes:

> ". . . any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:
>
> (1) Funds;
>
> (2) Services of Federal Personnel; or
>
> (3) Real and personal property or any interest in or use of such property, including
>
> (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government."

Other than procurement contracts, which are specifically excluded from the definition of "Federal financial assistance," the Commission does not provide any financial assistance to its licensees within the terms of the above-quoted definition. Moreover, except for the broad allegation that the licensees' parent organizations have contracts with the Federal government, petitioners have failed to demonstrate that the commercial licensees receive financial assistance from any other agency or department of the Federal government. Rather, petitioners characterize the respondents' Commission licenses as "contracts" which enable respondents to conduct a business and obtain financial profit and analogize this to receiving financial assistance from the government. Clearly, a Commission license is not a contract. Rather, it is a temporary, revocable, privilege conveying no property right, providing no service and transferring no financial interest. See generally, Sections 301 and 304 of the Communications Act of 1934, as amended, 47 U.S.C. 301, 304; *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940); and *Ashbacker Radio Corporation* v. *FCC,* 326 U.S. 327, 331-332 (1945). Therefore, petitioners have not shown that the commercial licensees are within the purview of the Rehabilitation Act.

11. Petitioners assert that KCET-TV, a non-commercial educational television station, is directly subsidized by the Federal government and thus comes within the scope of the Act. As we noted, previously, we would consider the bearing of a violation of the Act upon that licensee's qualifications should such a finding be made by the appropriate Federal agency. In our view, that agency is HEW. While at the time the subject Order was released we were not aware that HEW had been asked to make such a determination, we are now informed by petitioners that on March 13, 1978, a complaint against KCET-TV was filed with the HEW regional office.

However, petitioners also state that they have been advised by HEW that it is holding the complaint in abeyance pending the enactment of legislation by Congress to determine which agency has the responsibility to enforce compliance with the Rehabilitation Act. Thus, we again conclude that, with regard to KCET-TV, petitioners' allegation is premature. Should a determination later be made by the appropriate agency that KCET-TV did violate the Rehabilitation Act by failing to provide captioning, we would consider the effect of that determination upon the licensee's qualifications. Accordingly, petitioner has not supplied us with any material information which we have not already considered with regard to Section 504 of the Rehabilitation Act of 1973, as amended, and we will deny reconsideration as to that issue.

12. Finally, petitioners' claim that the Commission was required to adopt regulations to implement Section 504 of the Rehabilitation Act, and Executive Order 11914, is not supported by the evidence. Section 85.4(a) of HEW's rules implementing the Act and the subject Executive Order requires each agency to issue:

> ". . . a regulation to implement section 504 with respect to the programs and activities to which it provides assistance."

The term "agency", as it is used in these rules, is defined in Section 85.3(c) of HEW's rules. This definition is limited to:

> ". . . a Federal department or agency that is empowered to extend financial assistance."

As the Commission is not empowered to extend federal financial assistance, it is not an agency within the meaning of these rules and is not required by Section 85.4(a) of those rules to adopt regulations to implement Section 504. Thus, petitioners' claim that the Commission is required to promulgate rules implementing Section 504 is based upon a faulty premise and is without merit.

13. *Public Interest, Convenience and Necessity Determination.* Where appropriate, our grants of the subject renew-

al applications were properly based on statutory standards. In paragraph 25 of the subject Order, we stated:

> While we are able to make the necessary statutory finding of Section 309 of the Communications Act of 1934, as amended, to grant renewals of license to KNBC-TV, KNXT-TV, and KTLA-TV, due to various matters still pending before the Commission, the other five stations can not be renewed at this time.

Thus, as to three specifically mentioned stations, we found that we were able to make the "necessary statutory finding of Section 309 of the Communications Act of 1934, as amended," and granted renewal of the licenses. The only reasonable interpretation of that language includes finding that the public interest, convenience and necessity would be served by the grant. To whatever extent petitioners may not have understood our statutory finding, we reaffirm it herein.

14. Petitioners contend that by reason of our failure to require captioning or other techniques to enable the deaf and hearing impaired to have full access to television broadcasts, we have failed to act in the public interest and the fact that the licensees failed to provide such service rendered their performance a violation of the public interest. However, the subject Order contained an extended discussion of our actions regarding television licensees and the nation's hearing impaired. At the conclusion of that portion of the Order, we noted that:

> Thus, there is no requirement that any television licensee — commercial or non-commercial — provide open or closed captioning or any other form of special visual program material other than for broadcasting emergency information.

We find no error and nothing inconsistent in concluding that licensees are serving the public interest although they are not currently providing captioning, in view of the fact that we have not required licensees to undertake such an activity. Furthermore, to judge a licensee's qualifications on the basis of

the retroactive application of such a requirement would, in our opinion, raise serious questions of fundamental fairness. Thus, there is no inconsistency or error in our finding that the subject licensees had met their public interest burden even though they did not caption their programming.

15. *Ascertainment.* Petitioners charge that we "lumped" the ascertainment surveys of all of the subject licensees in determining that their ascertainment efforts were sufficient. This is not so. Rather, with regard to ascertainment, we stated that: 1) the Commission has no requirement that an applicant submit demographic data relating to an area's hearing impaired population with the ascertainment information included in a renewal application; and, 2) that even though there is no requirement for licensees to ascertain community leaders of the deaf, hearing impaired, and handicapped community as separate "checklist categories", many of the licensees herein did ascertain persons involved with "the whole range of concerns of the physically handicapped which includes the deaf and hearing impaired," as part of their ascertainment of leaders from the health, welfare, and elderly elements of the community.[7] Thus, we determined that the failure to include representatives of the aurally handicapped segment of society did not discredit the licensees' ascertainment efforts, We stand by this conclusion. As stated above, there is no current requirement that such persons be contacted, and it would violate our notions of fundamental fairness to retroactively impose such a new requirement upon licensees. We did not "lump" the efforts of the respondents. What we did conclude, parenthetically, was that even though there was no requirement, *most* of the licensees did ascertain leaders involved in the concerns of the physically handicapped, including the deaf and hearing impaired. Additionally, we noted that several of the licensees ascertained representatives from

[7] We also noted that licensees have the option of ascertaining leaders from, by way of example, the deaf and hearing impaired community under the "other" checklist category.

GLAD and other groups identified by petitioner as constituting persons aware of the problems of the aurally handicapped. Thus, we find no error warranting reconsideration.

16. *Programming.* Petitioners fault the Commission for not having taken action against the respondents for their failure to provide captioning or other supplementary visual material for use by the aurally handicapped. Again, petitioners object to the Commission's refusal to take action against licensees for their failure to do something that we have not required them to do.[8] Again, it would violate our notions of fairness to retroactively apply such a new requirement.

17. *Standing of GLAD.* Petitioners' allegation of error in our denial of standing to GLAD and its member organizations is without merit. As discussed in the Order released September 8, 1978, GLAD was inconclusive about its desire to participate in the proceeding and several of its member organizations notified licensees and the Commission that they did not wish to join in the petition. Whether these organizations were able to effectuate their withdrawal from the proceeding under GLAD's by-laws is an internal matter of GLAD in which we would not presume to interfere. However, it would likewise be inappropriate for us to consider these organizations as parties to a petition which they expressly repudiated. In any case, because of the uncertainty of GLAD's intentions in this matter, it was entirely correct to conclude that it lacked standing. However, assuming *arguendo* that GLAD had conclusively demonstrated its standing as a party in interest, it does not follow that it has been aggrieved by the Commission's denial of standing to it as the petition which it sought to be a party to was fully considered

[8] This conclusion is not affected by the petitioners' allegation that PBS's subtitled "From Paris With Love" program demonstrated that open captioning would be acceptable to the public. Even assuming, *arguendo,* that such is the case, we clearly have no requirement for such captioning and, as stated above, will not fault the licensees for their failure to provide it during the past license term.

on the merits. Thus, with regard to the issue of GLAD's standing, there has been no error warranting reconsideration.

Recent Developments

18. In our previous Order, we provided a background discussion of the Commission's actions regarding television licensees and the nation's hearing impaired. Since that time, further action has been taken which bears mention. Following the Commission's grant of authority in 1972 to the Public Broadcasting System (PBS) to initiate experiments in closed captioning utilizing the vertical blanking space of line 21 of the television broadcast signal and the Commission's adoption of rules in 1976 to permit closed captioning on Line 21 for visual display of aural material accompanying a television program,[9] PBS and the National Bureau of Standards (NBS), with funding provided by the Department of Health, Education and Welfare (HEW), have worked together on the development of the closed captioning technology. As a result of the experiments conducted by PBS and NBS, HEW recently announced the institution of a closed captioning project for the hearing impaired.[10] Participants in the project are PBS, ABC and NBC, which have agreed to provide a total of up to 20 hours of captioned programming a week by early 1980. The special decoding devices needed by the hearing impaired to enable them to see the captions will be provided by Sears, Roebuck & Co. with no mark-up for profit. HEW will help establish and fund a nonprofit National Captioning Institute that will caption programs for the television networks.

19. On April 5, 1979, the Commission received an extensive and comprehensive briefing on the progress of the closed captioning project by representatives of ABC, NBC, PBS and

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[9] *Amendment of Subpart E, Part 73, of the Commission's Rules and Regulations to Reserve Line 21 of the Vertical Blanking Interval of the Television Broadcast Signal for Captioning for the Deaf,* Docket No. 20693, 63 FCC 2d 378 (1976).

[10] *Broadcasting Magazine,* March 26, 1979, at 32-33.

HEW. As a result of the meeting, we are satisfied that important advances are being made toward achieving the goals which petitioners espouse and which we share — namely, the access of the aurally handicapped to the medium of television. We expect that the closed captioning project will be a success.[11] However, if at a later date it is demonstrated that the project is not successful in making television programming more available and enjoyable to the hearing impaired, then it may be necessary for the Commission to determine if a rule-making is warranted to ensure that the hearing impaired are not deprived of the benefits of television.

Conclusion

20. We find that the petitioners have raised no issue, have provided no new facts and have demonstrated no error in our previous decision which warrants the reconsideration of our Memorandum Opinion and Order released September 8, 1978, in this proceeding.

21. At the time the September 8, 1978, Memorandum Opinion and Order was released, renewal could not be granted to five of the challenged stations because of other matters then outstanding with regard to their applications. As these matters remain outstanding, no further action is being taken herein relative to their renewal applications.

22. Accordingly, IT IS ORDERED, That the Petition for Reconsideration, filed October 2, 1978, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO,
Secretary.

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[11] Transcript of Commission Meeting on Closed Captioning for the Deaf, April 5, 1979, at 3.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 79-1722

SUE GOTTFRIED, individually and on behalf of the deaf and hearing impaired population within the Stations' viewing area, and the Greater Los Angeles Council on Deafness, Inc., *Appellants*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

NATIONAL BROADCASTING COMPANY, INC., *et al., Intervenors*

BEFORE: Wright and McGowan, Circuit Judges and Gasch*, Judge, United States District Court for the District of Columbia

Order

(Filed July 8, 1981)

On consideration of the motion of intervenor Community Television of Southern California for leave to file supplement to petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED by the court that the Clerk is directed to file intervenor's lodged supplement and on consideration of the petitions for rehearing of appellee and of intervenor, it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,

/s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge McGowan would grant the petition for rehearing.

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 79-1722

SUE GOTTFRIED, individually and on behalf of the deaf and hearing impaired population within the Stations' viewing area, and the Greater Los Angeles Council on Deafness, Inc., *Appellants*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

NATIONAL BROADCASTING COMPANY, INC., *et al.*, *Intervenors*

BEFORE: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

Order

(Filed July 8, 1981)

The suggestions for rehearing *en banc* of appellee and intervenor have been circulated to the full Court. A majority of the Court have not voted in favor of the suggestions. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the suggestions of appellee and intervenor are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, *Clerk*

/s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges MacKinnon and Robb would grant the suggestions for rehearing *en banc*.

APPENDIX D

29 U.S.C. §794 provides:

§794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

47 U.S.C. §309 provides:

§309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Time of granting application

Except as provided in subsection (c) of this section, no such application—

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier, services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Applications not affected by subsection (b)

Subsection (b) of this section shall not apply—

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for—

(A) A minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(b) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance

for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or require-

ments phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) Temporary authorization of emergency operations under subsection (b)

When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405 of this title.

(g) Classification of applications

The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Form and conditions of station licenses

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title.

(June 19, 1934, ch. 652, title III, §309, 48 Stat. 1085; July 16, 1952, ch. 879, §7, 66 Stat. 715; Mar. 26, 1954, ch. 110, 68 Stat. 35; Jan. 20, 1956, ch. 1, 70 Stat. 3; Sept. 13, 1960, Pub. L. 86-752, §4(a), 74 Stat. 889; May 14, 1964, Pub. L. 88-306, 78 Stat. 193; May 14, 1964, Pub. L. 88-307, 78 Stat. 194.)

Opposition

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No. 81-651

In THE
Supreme Court of the United States
OCTOBER TERM, 1981

SUE GOTTFRIED

and

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; GOLDEN WEST BROADCASTERS; KCOP TELEVISION, INC.; METROMEDIA, INC.; NATIONAL BROADCASTING COMPANY, INC.; AND RKO GENERAL, INC.

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QUESTION PRESENTED

Whether the court of appeals was correct in holding that a commercial broadcast license does not constitute "Federal financial assistance" within the meaning of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Supp. III 1979).

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The following is a list of all parties that appeared before the court whose judgment is sought to be reviewed: Sue Gottfried; Greater Los Angeles Council on Deafness, Inc.; Federal Communications Commission; American Broadcasting Companies, Inc.; CBS Inc.; Golden West Broadcasters; KCOP Television, Inc.; Metromedia, Inc.; National Broadcasting Company, Inc.; RKO General, Inc.; and Community Television of Southern California.*

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* In light of the purposes of Rule 28.1, we construe the terms "parent companies," "subsidiaries" and "affiliates" to mean those corporations (1) whose shares are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries and affiliates," a majority of whose shares are owned by a party.

American Broadcasting Companies, Inc., CBS Inc., Golden West Broadcasters and Metromedia, Inc., have no "parent companies, subsidiaries and affiliates" so defined.

KCOP Television, Inc. is a wholly owned subsidiary through two intermediate nonpublicly traded corporations of Chris-Craft Industries, Inc.

National Broadcasting Company, Inc. is a wholly owned subsidiary of RCA Corporation.

RKO General, Inc. is a wholly owned subsidiary of the General Tire & Rubber Company. Frontier Airlines, Inc. is a subsidiary of RKO General, Inc.

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In THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-651

SUE GOTTFRIED

and

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; GOLDEN WEST BROADCASTERS; KCOP TELEVISION, INC.; METROMEDIA, INC.; NATIONAL BROADCASTING COMPANY, INC.; AND RKO GENERAL, INC.

Respondents American Broadcasting Companies, Inc.; CBS Inc.; Golden West Broadcasters; KCOP Television, Inc.; Metromedia, Inc.; National Broadcasting Company, Inc.; and RKO General, Inc. respectfully request that this Court deny the Petition for Writ of Certiorari filed herein on October 2, 1981, to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 17, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 655 F.2d 297. The court's opinion appears in the Appendix to the Petition at pp. 1a-40a. The court vacated and remanded for further proceedings those portions of the Federal Communications Commission ("FCC") orders and opinions concerning KCET, the public broadcasting station, but affirmed those portions of the FCC's orders and opinions concerning the license renewal applications of seven commercial television stations in Los Angeles. The FCC's orders and opinions are reported at 69 F.C.C.2d 451 (1978), *recon. denied*, 72 F.C.C.2d 273 (1979), and appear in the Appendix to the Petition at pp. 41a-67a.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1981. The public television station, KCET, and the Federal Communications Commission filed timely petitions for rehearing and suggestions for rehearing *en banc* which were denied on July 8, 1981. A copy of the court's denial appears in the Appendix to the Petition at pp. 69a-72a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended (Supp. III 1979), and section 309 of the Communications Act of 1934, 47 U.S.C. § 309, as amended (1976), appear in the Appendix to the Petition at pp. 73a-78a.[1]

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[1] Hereinafter, the Appendix to the Petition for a Writ of Certiorari will be cited as "Pet. App. at ——."

STATEMENT OF THE CASE

This case involves section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended (Supp. III 1979). That section provides that "[n]o otherwise qualified handicapped individual . . . shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in "any program or activity receiving Federal financial assistance . . . ." [2]

Petitioner Sue Gottfried [3] petitioned to deny the 1977 license renewal applications of seven of the commercial stations in the Los Angeles area (respondents herein) and the noncommercial television station, KCET.[4] She alleged generally that all eight stations had failed to ascertain (*i.e.*, to determine) the problems, needs and interests of the hearing impaired.[5] In addition, Gottfried alleged that the stations had violated section 504 of the Rehabilitation Act and the public interest standard of the Communications Act, 47 U.S.C. § 309 (1976), by failing to caption programs for the hearing impaired.[6]

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[2] That section provides in part:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."

[3] Petitioner in this Court—the Greater Los Angeles Council on Deafness ("GLAD"), an umbrella organization that purports to represent forty organizations serving the deaf in the Los Angeles Community—joined with Gottfried in the petitions to deny. However, the Commission held that an insufficient showing had been made that GLAD or its component organizations had authorized anyone to represent them as petitioners. *See* Pet. App. at 57a-58a & n.4.

[4] Pet. App. at 41a.

[5] Pet. App. at 42a.

[6] Pet. App. at 42a-43a.

In their oppositions, the commercial and public broadcasters demonstrated that they had complied with Commission ascertainment requirements,[7] and had in fact presented news, public affairs and entertainment programming dealing with the problems of the hearing impaired.[8] In addition, although they were not required

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[7] *See* Opposition to Sue Gottfried *et al.* Petition to Deny, *In re Application of American Broadcasting Companies, Inc. for Renewal of License of Station KABC-TV, Los Angeles, California* (Opposition of Station KABC-TV), January 31, 1978 at 2-3; Opposition to Petition to Deny Renewal of Broadcast License, *In re Application of KCOP, Inc. (KCOP), Los Angeles, California, for Renewal of Broadcast License* (Opposition of Station KCOP), November 30, 1977 at 4-9; Opposition to Petition to Deny, *In re Application of Golden West Broadcasters for Renewal of License of Television Station KTLA, Los Angeles, California* (Opposition of Station KTLA), December 12, 1977 at 5-12; Motion to Dismiss, *In re Application of RKO General, Inc. for Renewal of License of Station KHJ-TV, Los Angeles, California* (Opposition of Station KHJ-TV), December 1, 1977 at 5-13; National Broadcasting Company, Inc.'s Opposition to and Motion to Dismiss "Petition To Deny Renewal of License," *In re Application of National Broadcasting Company, Inc. for Renewal of License for Television Station KNBC, Burbank, California* (Opposition of Station KNBC), December 1, 1977 at 5-7; Motion To Dismiss and Opposition to Petition to Deny, *In re Renewal of Television License of Station KNXT, Channel 2, Los Angeles, California* (Opposition of Station KNXT), November 23, 1977 at 5-11; Motion to Dismiss or, in the Alternative, Opposition to Petition To Deny, *In re Metromedia, Inc. for Renewal of License Station KTTV(TV), Los Angeles, California* (Opposition of Station KTTV), February 23, 1978 at 13-19; Opposition to "Petition to Deny Renewal of License," *In re Application of Community Television of Southern California, Los Angeles, California, for Renewal of License of Noncommercial Educational Television Station KCET* (Opposition of Station KCET), November 30, 1977 at 2-6.

[8] *See* Opposition of Station KABC-TV at 10-11; Opposition of Station KCOP at 11; Opposition of Station KHJ-TV at 11-12; Opposition of Station KNBC at 8-10; Opposition of Station KNXT at 12-18; Opposition of Station KTLA at 13-15; Opposition of Station KTTV at 17 and Attachment no. 6; Opposition of Station KCET at 6-11.

to do so, several of the commercial broadcasters as well as KCET stated that they had provided captioned or signed programs for the hearing impaired, and others had supplemented their programming with explanatory visual materials.[9]

With respect to the applicability of section 504, the commercial broadcasters pointed out that it only prohibits discrimination against handicapped individuals by "any program or activity receiving Federal financial assistance." Since the holding of a television license does not constitute the receipt of "Federal financial assistance," they urged that section 504 did not apply to them.[10] KCET argued that even if it was a recipient of "Federal financial assistance" by reason of government grants to public broadcasters, the Commission was not an appropriate forum for the adjudication of the Rehabilitation Act claims.[11]

On September 28, 1978, the Commission dismissed the petitions to deny, holding that an insufficient showing had been made on the merits to deny renewal of the broadcast licenses.[12] The Commission found that the licensees' ascertainment efforts satisfied Commission requirements and that all the stations here had presented programs about the problems of the hearing impaired.[13] The Commission ruled that section 504 did not apply

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[9] *See* Opposition of Station KTTV at 17-18; Opposition of Station KTLA at 15 n.15; Opposition of Station KABC-TV at 5 and Attachment B; Opposition of Station KNBC at 9-10; Opposition of Station KCET at 4-9.

[10] *See* Opposition of Station KABC-TV at 12-13; Opposition of Station KNBC at 12-13; Opposition of Station KNXT at 19-22; Opposition of Station KTLA at 15-18; Opposition of Station KTTV at 19-20.

[11] *See* Opposition of Station KCET at 13.

[12] Pet. App. at 52a-54a.

[13] Pet. App. at 47a-51a.

to commercial broadcasters, and that, if section 504 imposed any obligations on KCET, the Department of Health, Education, and Welfare ("HEW") was the proper agency to define and enforce them.[14] The Commission said that if HEW made any adverse findings against KCET, it would consider them and take appropriate action.[15]

Apart from section 504 the Commission declined to impose any general requirement that stations utilize captioning or other techniques to make all programming accessible to the hearing impaired, noting that there were "too many unanswered questions," both "tech ical and financial," to permit the imposition of additional requirements in this area at this time.[16] However, the Commission pointed out that it had for almost a decade encouraged the voluntary development by broadcasters of technically and financially feasible methods of making television accessible to the hearing impaired and that substantial progress had been made in this regard. For example, the Commission noted that broadcasters had been required to transmit emergency information visu-

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[14] The Department of Education, as successor to HEW, is currently considering what, if any, regulations should be imposed under section 504 on broadcasters receiving funds for the production of television programs from that Department. *See* Dept. of Education, Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting From Federal Financial Assistance, 46 Fed. Reg. 4954 (Jan. 19, 1981), *corrected*, 46 Fed. Reg. 18321 (Mar. 24, 1981). Recently the United States District Court for the Central District of California, in a proceeding commenced by these petitioners, has ordered the Department of Education to adopt regulations requiring captioning of all government-funded programs broadcast by public stations. *See Greater Los Angeles Council on Deafness, Inc., et al. v. Community Television of Southern California, et al.*, Civil No. 78-4715-R (C.D. Cal.).

[15] Pet. App. at 51a-52a.

[16] Pet. App. at 46a.

ally, and that experiments with "closed captioning" had been encouraged and recently approved.[17]

Gottfried filed a petition for reconsideration which raised essentially the same issues as the original petitions to deny.[18] On June 15, 1979, the Commission denied reconsideration but noted that various proposals for closed captioning had been made by broadcasters, and that a closed captioned system was being implemented by ABC, NBC and PBS. The Commission concluded that "important advances are being made toward achieving the goals which petitioners espouse . . . namely, the access of the aurally handicapped to the medium of television. We expect that the closed captioning project will be a success." [19]

On appeal under 47 U.S.C. § 402(b) (1976), the court of appeals unanimously affirmed the Commission's decision as to the seven commerical broadcast stations; however, a divided panel remanded the case to the Commission for further proceedings to determine whether KCET, the public broadcasting station, had met the needs of the hearing impaired and thus complied with the public interest standard of the Communications Act. The different results were necessitated, the court held, by the

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[17] Pet. App. at 45a-46a. "Closed captioning" involves the encoding of subtitles on the television picture that are visible only on a television set equipped with a decoder.

In addition, the Commission recently commenced a rulemaking proceeding that authorizes television stations to provide teletext services. The teletext system would provide for closed captioning of television programs in addition to other services. In that proceeding it has been urged that teletext "has the capability to provide captioning services that are in many respects superior to those of the existing system and also offers many new features with potential value for all television users." *See* FCC Press Release, Oct. 22, 1981 at 2.

[18] Pet. App. at 67a.

[19] Pet. App. at 67a.

fact that section 504 of the Rehabilitation Act applies to public but not commercial broadcast licensees.[20]

The court found that noncommercial educational stations, including KCET, receive funds from Congressional appropriations channeled through, among other sources, the National Telecommunications and Informational Administration of the Department of Commerce and the Corporation for Public Broadcasting, and are therefore subject to section 504.[21] Since section 504 was found to be applicable, the FCC was required to weigh this statutory obligation in determining whether a renewal of KCET's license would serve the public interest.[22] The court remanded the case to the Commission with instructions that it hold a hearing.[23]

The court concluded that commercial broadcast licenses, on the other hand, do not constitute "Federal financial assistance" within the meaning of section 504.[24] The court reached this conclusion after examining the legislative history of section 504 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), after which section 504 was modeled. The floor debates and congressional hearings, the court found, provide ample evidence that the term "Federal financial assistance" was intended to mean "funds" and "public moneys out of the Federal Treasury"—not federal licenses.[25] The court also pointed out that the Department of Justice, the agency presently responsible for coordinating federal efforts to implement the Rehabilitation Act, had specifically concluded that federal licensees are not covered by section 504.[26] Finally,

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[20] Pet. App. at 13a-15a.

[21] Pet. App. at 15a-17a.

[22] Pet. App. at 20a-21a.

[23] Pet. App. at 23a-28a.

[24] Pet. App. at 28a-33a.

[25] Pet. App. at 29a-31a.

[26] Pet. App. at 32a-33a.

the court noted that this interpretation was consistent with the Commission's interpretation "of the Communications Act of 1934, under which licenses are not regarded as establishing property rights, even though licensees do enjoy a limited renewal expectancy." [27]

Since section 504 imposes no specific obligation on the commercial broadcasters, the court held "that it would not be appropriate for us to delineate standards for the commercial stations or to require specific Commission procedures at this time." [28] The court noted with approval the voluntary efforts presently being taken by commercial broadcasters to provide programming for the hearing impaired, and deferred to the Commission's "special competence in weighing the factors of technological feasibility and economic viability that the concept of the public interest must embrace . . . ." [29] However, if these efforts failed to make television more accessible to the hearing impaired, the court said, "judicial action might become appropriate at a later date." [30]

On July 8, 1981, the court denied KCET's and the Commission's petitions for rehearing and suggestions for rehearing *en banc*.[31]

On August 14, 1981, KCET petitioned this Court for a writ of certiorari to review the decision of the court of appeals with respect to the public broadcasting stations (No. 81-298).[32] On October 27, 1981, the Solicitor Gen-

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[27] Pet. App. at 33a (citations omitted).

[28] Pet. App. at 35a.

[29] Pet. App. at 36a.

[30] Pet. App. at 37a.

[31] Pet. App. at 69a-72a.

[32] *Community Television of Southern California v. Sue Gottfried*, Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 81-298, filed August 14, 1981.

eral, on behalf of the Federal Communications Commission, also petitioned for a writ of certiorari to review the decision of the court of appeals as it relates to public broadcasting stations (No. 81-799).[33] While neither petition challenges the court of appeals' determination that KCET is a recipient of federal financial assistance and is thus subject to section 504, they assert that the court of appeals, contrary to decisions by this Court (*e.g.*, *FCC v. WNCN Listeners Guild*, 101 S. Ct. 1266 (1981)), improperly substituted its judgment for that of the Commission both in defining the "public interest" standard and in determining how that standard should be met.

On October 2, 1981, petitioners Gottfried and GLAD filed the present petition to review the court of appeals' holding that a commercial broadcast license does not constitute "Federal financial assistance" within the meaning of section 504.[34]

ARGUMENT

Review By This Court Is Not Warranted Since the Decision Below Is Not in Conflict with Any Decision of Any Other Court of Appeals or of This Court, and Is Clearly Correct.

Petitioners Gottfried and GLAD contend that this Court should grant certiorari to consider whether the court of appeals was correct in holding that commercial broadcast licenses do not constitute "Federal financial assistance" and that commercial broadcasters are not subject to the provisions of section 504 of the Rehabilitation Act. Petitioners assert no conflict in the circuits

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[33] *FCC v. Sue Gottfried*, Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 81-799, filed October 27, 1981.

[34] *Sue Gottfried v. FCC*, Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 81-651, filed October 2, 1981.

as to the meaning of the term "Federal financial assistance," and indeed no other circuit has reached a result contrary to that of the District of Columbia Circuit. Moreover, the decision below is clearly consistent with this Court's decisions, particularly those holding that a broadcast license is not "property." [35] Nor do petitioners provide any other reason why this Court should review the court of appeals' interpretation of the term "Federal financial assistance" within the meaning of section 504.

The Commission in this case, as well as in a related rulemaking proceeding,[36] concluded that it "does not provide any financial assistance to its licensees," [37] and that a broadcast license is merely a "temporary, revocable, privilege conveying no property right, providing no service and transferring no financial interest." [38]

The court of appeals similarly found, after carefully reviewing the language, legislative history and past interpretations of section 504, that Congress did not intend the receipt of a federal license to subject the licensee to the provisions of section 504.[39] This conclusion was clearly correct.

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[35] *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969); *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 n.6 (1945); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

[36] *See Amendment of Broadcast EEO Rules and FCC Form 395*, 76 F.C.C.2d 86 (1980), *appeal pending, California Association of the Physically Handicapped, Inc. v. FCC*, Nos. 80-7157, 80-7482, 80-6088 (9th Cir.). That proceeding concerned extension of the Commission's EEO rules, which currently apply to women and minorities, to include the handicapped. The Commission held that "[u]pon further consideration of the Section 504 issue, [we remain] convinced that Congress did not intend the grant of a license to constitute Federal financial assistance." *Id.* at 97-98.

[37] Pet. App. at 61a.

[38] Pet. App. at 61a.

[39] Pet. App. at 29a-33a.

First, as the court noted, section 504 was modeled after Title VI of the 1964 Civil Rights Act.[40] The history of section 601 clearly demonstrates that Congress intended "Federal financial assistance" in that Act to mean assistance in the form of funds.[41] Both the legislative history of section 601 [42] and contemporaneous Justice Department interpretation,[43] make clear that commercial broadcast licenses do not constitute such assistance. In view of the legislative history and interpretation of section 601, it is

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[40] Pet. App. at 29a. The language of section 504 closely tracks that of section 601, 42 U.S.C. § 2000d (1976), which provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[41] Pet. App. at 29a-30a & n.56.

[42] Pet. App. at 30a-31a. Significantly, a Minority Report prepared by the Committee on Judiciary while the Civil Rights bill was being considered contained a list of programs that would be affected by section 601. This list contained no reference to the grant of a license by a federal agency. *See* Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2471-73.

[43] Following passage of the Civil Rights Act of 1964, the Justice Department was charged with responsibility for coordinating the implementation of Title VI and worked with all affected federal departments and agencies required to issue Title VI regulations. The Justice Department did not direct the FCC to issue regulations, apparently because it concluded that the Commission does not provide any federal financial assistance within the meaning of Title VI. Moreover, then Deputy Attorney General Katzenbach prepared a list of programs and activities that received federal financial assistance for purposes of Title VI, 110 CONG. REC. 13380-82 (daily ed. June 10, 1964). The list did not include the grant of a license by a federal agency.

clear that section 504, like section 601, does not apply to broadcast licenses.

Second, there is nothing in the legislative history of section 504 suggesting that Congress intended that section to apply to commercial broadcast licensees. If Congress had intended to include commercial broadcast licensees, federally chartered banks, and recipients of trading licenses within the scope of section 504, it surely would have made its intention explicit.

Third, regulations of the Justice Department—now designated by Executive Order to coordinate federal implementation of the Rehabilitation Act [44]—specifically provide that federal licensees are not recipients of "Federal financial assistance" and that section 504 does not apply to them.[45] This determination is entitled to substantial weight.[46]

Finally, the conclusion that a broadcast license does not constitute "Federal financial assistance" within the meaning of section 504 is confirmed by the language and legislative history of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, and with this Court's decisions interpreting that statute.[47] The purpose of the Com-

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[44] *See* E.O. 12250, 45 Fed. Reg. 72995 (Nov. 4, 1980).

[45] Pet. App. at 32a-33a.

[46] *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 134-35 (1977); *NLRB v. Pipefitters, Local 638*, 429 U.S. 507, 528 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[47] *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969); *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331-32 (1945); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

munications Act was to regulate wire and radio communication to ensure that it would be used to further the public interest; it was not intended to confer a property interest of any kind upon recipients of federal licenses, even though such licensees enjoy a limited renewal expectancy.[48]

Since the decision below is not in conflict with decisions of this or any other court and is clearly correct, review is not warranted. We note that the issue presented in this petition—whether section 504 applies at all to commercial broadcasters—is clearly distinct from the issues presented by KCET and the FCC in their petitions for certiorari, Nos. 81-298 and 81-799 respectively. Those petitions are simply not concerned with the issue of the applicability of section 504 to public broadcast stations, much less the issue of its applicability to commercial stations. Rather, those petitions raise the quite separate question of whether when section 504 applies, the FCC must determine a public station's compliance with that section in making the Commission's "public interest" determination in a license renewal proceeding.[49]

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[48] Pet. App. at 33a.

[49] Petitioners also urge that certiorari should be granted because, if the court of appeals erred in not finding commercial broadcasters to be recipients of federal financial assistance, it also erred in not incorporating section 504 in the public interest standard as it applies to commercial broadcasters. To be sure, if the court of appeals had held that section 504 was applicable to commercial broadcasters, the additional questions would exist as to whether the FCC is required to incorporate section 504 in the public interest standard, and what requirements, if any, section 504 imposes. The fact that these issues would arise in this case if the court of appeals had not reached the clearly correct conclusion that section 504 is inapplicable to commercial broadcasters obviously provides no reason to grant the present petition.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be denied.

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Opposition

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No. 81-651

In the Supreme Court of the United States

OCTOBER TERM, 1981

SUE GOTTFRIED AND GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether a broadcast license issued by the Federal Communications Commission constitutes "Federal financial assistance" under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 655 F. 2d 297. The decisions of the Federal Communications Commission (Pet. App. 41a-67a) are reported at 69 F.C.C. 2d 451 and 72 F.C.C. 2d 273.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1981. Petitions for rehearing were denied on July 8, 1981 (Pet. App. 69a-72a). The petition for certiorari was filed on October 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arose when petitioners and certain other persons petitioned the Federal Communications Commission to deny license renewal applications filed by seven commercial and one noncommercial television stations in the Los Angeles area. The petitions charged, among other things, that the stations had violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 794, during the 1974-1977 license term under review by failing to make their broadcasts accessible to the hearing impaired. Section 504 provides in relevant part that "[n]o otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The Commission denied the petitions (Pet. App. 41a-54a). It held that the commercial stations were not subject to Section 504 because they did not receive federal financial assistance (*id.* at 52a). By contrast, the Commission observed that the noncommercial station "might fall within the purview" of Section 504 since it received federal grants (*ibid.*). Accordingly, the Commission stated that it would take into consideration any violations of Section 504 found by "the proper governmental agency to consider such matters," but it declined to make an independent assessment of the noncommercial station's compliance with Section 504 (*ibid.*).

The Commission subsequently denied petitioners' application for rehearing (Pet. App. 55a-67a). Noting that the Department of Health, Education, and Welfare (the agency then responsible for coordinating the implementation of Section 504) had issued a regulation defining "Federal financial assistance," the Commission observed that it "does not provide any financial assistance to its licensees within the terms of [that definition]" (*id.* at 60a-61a). The

Commission also specifically rejected the argument that a broadcast license constitutes a "contract" or some other form of financial aid (*id.* at 61a). A broadcast license, the Commission stated, "is a temporary, revocable, privilege conveying no property right, providing no service and transferring no financial interest" (*ibid.*).

A panel of the United States Court of Appeals for the District of Columbia Circuit unanimously affirmed the denial of the petitions concerning the seven commercial stations and held that broadcast licenses do not constitute "Federal financial assistance" within the meaning of Section 504 (Pet. App. 28a-37a, 38a). Pointing out that Section 504 was expressly modeled after Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, the court found ample evidence in the legislative history of the latter provision to show that Congress did not intend to reach the holders of broadcast licenses (*id.* at 29a-31a). The court also relied upon the fact that the agencies responsible for implementing Section 601 and Section 504 had concluded that broadcast licenses and other licenses issued by the federal government are not "Federal financial assistance" within the meaning of those provisions (*id.* at 31a-33a). Finally, the court of appeals noted that the Commission and this Court have long held that broadcast licenses are not property rights (*id.* at 33a & n.66).

The courts of appeals reached a different result with respect to the one noncommercial television station, which received substantial federal grants (Pet. App. 16a n.39, 17a). With one judge dissenting, the majority held that the Commission, in determining whether to renew that station's license, was obligated to make an independent assessment of the station's compliance with Section 504, even though enforcement of that provision is committed to other federal agencies (*id.* at 15a-28a). The court therefore vacated the denial of the petition concerning that station and remanded

the case to the Commission for further proceedings (*id.* at 37a). Both the Commission and the station have filed petitions for a writ of certiorari seeking review of that portion of the court of appeals decision. *Federal Communications Commission* v. *Sue Gottfried,* petition for cert. pending, No. 81-799; *Community Television of Southern California* v. *Sue Gottfried,* petition for cert. pending, No. 81-298. However, the questions presented by those petitions[1] are unrelated to the question raised here.

ARGUMENT

The court of appeals correctly held that a broadcast license does not constitute "Federal financial assistance" within the meaning of Section 504 and, consequently, that licensees are not subject to the requirements of that provision. That portion of the court of appeals' decision conflicts with no decision of this Court or of any other court of appeals. Accordingly, further review of that portion of the decision is not warranted.

1. That broadcast licenses do not constitute "Federal financial assistance" under Section 504 is abundantly clear. First, the plain meaning of the term "financial assistance" lends no support to petitioners' argument. In ordinary usage, that term connotes the payment of money (see *Webster's Third New International Dictionary (Unabridged)* 851 (1976 ed.)), rather than the issuance of licenses. For example, courts are not normally thought to furnish "financial assistance" to lawyers even though they issue them licenses that are essential to their livelihood. Second, as noted by the court below, the legislative history of Section 601 of Title VI of the Civil Rights Act of 1964, provides persuasive evidence that Section 504 of the Rehabilitation Act was not intended to reach broadcast licensees. Section 601 forbids

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[1] Neither of those petitions contests the court of appeals' holding that commercial stations are beyond the scope of Section 504.

discrimination "on the ground of race, color, or national origin" under "any program or activity receiving Federal financial assistance." That provision served as the model for Section 504. S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974); S. Rep. No. 93-1139, 93d Cong., 2d Sess. 24 (1974); H.R. Rep. No. 93-1457, 93d Cong., 2d Sess. 27 (1974). Except for the type of discrimination employed, both provisions employ virtually identical language. In using the term "Federal financial assistance" in Section 504, Congress gave no indication that it meant that term to carry a meaning different from that of the same term in the earlier enactment. It is highly significant for present purposes, therefore, that broadcast licenses do not constitute "Federal financial assistance" within the meaning of Section 601.

Before Title VI was enacted, the Justice Department compiled and submitted to Congress "a list of programs and activities which [might] involve Federal financial assistance" (110 Cong. Rec. 13380 (1964)). That list failed to include broadcast licenses or any other license issued by federal agencies.[2] Similarly, in hearings and floor debates, it was stated that Section 601 would apply to recipients of federal "funds" and "public moneys," but licenses were never mentioned (Pet. App. 30a & nn.57, 58).

After Title VI became law, the Justice Department, which was responsible for coordinating the implementation of that statute (Exec. Order No. 11247, 30 Fed. Reg. 12327 (1965)), promulgated a regulation (28 C.F.R. 42.102(c)) stating:

> The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property,

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[2]Significantly, the list included certain programs and activities assisted by federal agencies, such as the Federal Power Commission, that do issue licenses. Licenses, however, were omitted from the list.

> (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

Although petitioner contends (Pet. 16) that this regulation supports his argument, precisely the opposite is true. The omission from such a detailed definition of any express reference to licenses is strong evidence that licenses were not intended to come within the definition's scope. Equally significant is the fact that although "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity * * *" was required to issue implementing "rules, regulations, or orders" (42 U.S.C. 2000d-1), no such "rules, regulations, or orders" applicable to licensees were promulgated by the FCC or by other federal agencies that grant comparable licenses. Since Congress was presumably aware of the administrative interpretation of the term "Federal financial assistance" in Section 601, Congress would not have silently employed the same language in Section 504 of the Rehabilitation Act if a different meaning had been intended.[3]

Petitioners' response to these arguments is unpersuasive. They first dispute the relevance of the legislative history of Section 601, arguing (Pet. 14) that "[t]here is nothing in the § 504 legislative history stating that Title VI legislative

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[3]See also 34 C.F.R. 106.2(g), which defines "Federal financial assistance" within the meaning of 20 U.S.C. 1681(a), a provision enacted in 1972 and prohibiting discrimination "on the basis of sex" under "any education program or activity receiving Federal financial assistance."

history controls the construction of § 504." On the contrary, however, the legislative history of Section 504 reveals that it was patterned after Section 601. Thus, in the absence of any indication of contrary congressional intent, it is reasonable to conclude that identical language in the two statutes was intended to have the same meaning.

Noting the differences in the types of discrimination prohibited by the two provisions, petitioners contend (Pet. 14-15) that Section 504 should have a broader scope than Section 601. If anything, we would suppose the opposite to be true, since Title VI of the Civil Rights Act of 1964, unlike the Rehabilitation Act of 1973, serves to protect fundamental constitutional rights. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 285 (1978) (opinion of Powell, J.); *id.* at 328-329 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *id.* at 416 (opinion of Stevens, J.).

Finally, petitioners assert (Pet. 16) that even if the meaning of Section 601 is relevant to the interpretation of Section 504, "the courts and federal agencies responsible for enforcing the mandates of Title VI [have] construed federal financial assistance broadly." But whether those definitions are narrow or broad is of little relevance, since none mentions broadcast licenses or any other licenses issued by federal agencies.

2. The federal agencies charged with enforcing Section 504 have also determined that broadcast licenses do not constitute "Federal financial assistance," and those administrative interpretations are entitled to considerable weight. *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 134-135 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). During the period when it was responsible for coordinating the implementation of Section 504, the Department of Health, Education, and Welfare issued a regulation (45

C.F.R. 85.3(e), redesignated as 28 C.F.R. 41.3(e), 46 Fed. Reg. 40686 (1981)), stating:

> "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:
>
> (1) Funds;
>
> (2) Services of Federal personnel; or
>
> (3) Real and personal property or any interest in or use of such property, including:
>
> (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
>
> (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

This definition, like that in the Title VI regulations, refutes petitioners' argument. HEW surely knew that various federal agencies issue licenses and that those licenses sometimes have considerable value. If HEW had intended to include licenses within the scope of its detailed definition, it would have done so expressly. In 1980, the Justice Department took over the responsibility for coordinating the implementation of Section 504, but the definition of "Federal financial assistance" was not changed. Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980). Indeed, just a few months earlier the Justice Department had issued regulations stating

that "[t]he term 'Federal financial assistance' * * * does not include licenses * * *" (45 Fed. Reg. 37632 (1980)).[4]

3. Petitioners also contend (Pet. 11-12) that the FCC provides "financial assistance" to broadcasters because it processes various applications without charging fees. Their argument, however, clearly lacks merit. Since Congress did not regard broadcast licenses as "Federal financial assistance," it is highly unlikely that Congress took a different view with respect to the processing of applications for licenses or other permits, especially since the value of the license itself far exceeds the cost of the services provided. Moreover, the potential implications of petitioners' argument are staggering. If "Federal financial assistance" is extended whenever the government processes applications, requests, or other documents without charging a fee (*e.g.*, by processing Freedom of Information Act requests or income tax returns) then few persons or entities would escape Section 504's reach. There is nothing to indicate that Congress intended such a far-reaching result.

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[4]The conclusion that a broadcast license is not "financial assistance" under Section 504 finds further support in the provisions of the Communications Act and this Court's decisions concerning that Act. Section 301 of the Communications Act, 47 U.S.C. 301, expressly states that "no [broadcast] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." Similarly, this Court has held that Congress did not intend for the grant of a license to create any property rights (*Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327 331-332 (1945); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940)) even though, as petitioners note (Pet. 10), such licenses may have considerable value and licensees who serve the public interest enjoy some legitimate expectation of renewal. See, *e.g.*, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 805 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

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DECEMBER 1981

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[5]Since the petition in this case raises a question unrelated to the question presented in cases No. 81-799 and 81-298, there is no need to hold the petition in this case pending the Court's disposition of the petition in the other two cases.

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Petitioner's Reply Brief

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No. 81-651

IN THE

Supreme Court of the United States

October Term, 1981

SUE GOTTFRIED, individually, and on behalf of the deaf and hearing impaired population within the stations' viewing area, and GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC.,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

NATIONAL BROADCASTING COMPANY, INC.; METROMEDIA, INC.; AMERICAN BROADCASTING COMPANIES, INC.; KCOP TELEVISION, INC.; RKO GENERAL, INC.; GOLDEN WEST BROADCASTERS, AND CBS, INC.,

Intervenors.

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No. 81-651

IN THE

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SUE GOTTFRIED, individually, and on behalf of the deaf and hearing impaired population within the stations' viewing area, and GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC.,

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NATIONAL BROADCASTING COMPANY, INC.; METROMEDIA, INC.; AMERICAN BROADCASTING COMPANIES, INC.; KCOP TELEVISION, INC.; RKO GENERAL, INC.; GOLDEN WEST BROADCASTERS, AND CBS, INC.,

Intervenors.

REPLY BRIEF FOR PETITIONERS.

On November 17, 1981 — after petitioners filed their petition for writ of certiorari herein — the United States District Court, Central District of California, decided the case of *Greater Los Angeles Council on Deafness, Inc., etc., et al. v. Community Television of Southern California, dba KCET, et al.*, No. CV 78-4715 R.[1] The court there found that the franchise given by the FCC to broadcasters

[1]Attached hereto as an appendix is the court's Findings of Fact and Conclusions of Law.

for free constitutes federal financial assistance within the meaning of § 504 and the controlling HEW regulation (Finding 29, *see also* Findings 27 and 28). The court also found that broadcast licensees receive through the FCC the services of federal personnel, free of charge, and that this too constitutes federal financial assistance within the meaning of § 504 (Findings 30 and 31).

Petitioners herein contend that commercial broadcasters receive federal financial assistance within the meaning of § 504 and the controlling HEW regulation because, *inter alia*, the Commission grants federal financial assistance when it gives to commercial broadcasters the free and exclusive use of a limited and valuable part of the public domain and because the Commission gives commercial broadcasters the services of federal personnel, free of charge. The invervenors in their joint opposition to the petition for writ of certiorari (pgs. 10-11) argue that there is no conflict in the circuits as to the applicability of § 504 to commercial broadcasters. With the ruling in *Greater Los Angeles Council on Deafness, Inc., etc., et al. v. Community Television of Southern California, dba KCET, et al.*, D.C. Central District of California No. CV 78-4715 R, there is a conflict between the District of Columbia Circuit, and the United States District Court for the Central District of California.

CONCLUSION.

The petition for a writ of certiorari should be granted.

DATED: December 14, 1981.

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APPENDIX.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Greater Los Angeles Council on Deafness, Inc., etc., et al., Plaintiffs vs. Community Television of Southern California, dba KCET, et al., Defendants. No. CV 78-4715 R.

Filed Nov. 17, 1981.

Pursuant to Rule 52(b) of the Federal Rules of Civil Procedure and after trial of this case, the court makes the following findings of fact and conclusions of law in the above entitled matter.

FINDINGS OF FACT

PARTIES

1. The original plaintiffs consisted of Greater Los Angeles Council on Deafness, Inc., a California non-profit corporation, Marcella M. Meyer and Sue Gottfried, for themselves and in behalf of all others similarly situated. The original defendants consisted of Community Television of Southern California, doing business as KCET, James L. Loper, William J. Lamb, Federal Communications Commission, Corporation for Public Broadcasting, Public Broadcasting Service, California Public Broadcasting Commission, United States Department of Health, Education and Welfare and its Secretary.

2. Prior to trial, Greater Los Angeles Council on Deafness, Inc., a California non-profit corporation, was dismissed, as not having standing to sue.

3. After plaintiffs put on their case, the following defendants were dismissed from the action: Community Television of Southern California, doing business as KCET,

James L. Loper, William J. Lamb, Corporation for Public Broadcasting, Public Broadcasting Service, California Public Broadcasting Commission.

4. Prior to the federal defendants putting on their case, the following defendants were added as parties: Department of Justice, and Health and Human Services (HHS).

5. The action has been certified as a class action.

SECTION 504 AND ITS IMPLEMENTING REGULATION

6 Section 504 was enacted September 26, 1973 and provides as follows:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.*"[1]

7. On April 28, 1976, President Ford issued Executive Order No. 11914 instructing HEW to implement section 504 and to coordinate the implementation of section 504 by

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[1]The italicized words were added by the 1978 Amendment to section 504.

all federal departments and agencies empowered to extend federal financial assistance to any program or activity.

8. On May 4, 1977, the Secretary of HEW issued a regulation implementing section 504 (45 C.F.R. Part 84). The regulation set forth prohibited discriminatory practices against handicapped persons, and provided for program access. Although the regulation applied specifically to recipients of federal financial assistance from HEW, the regulation stated that it would be used as a guideline for other agencies required to issue section 504 regulations.

9. Pursuant to Executive Order No. 11914, the Secretary of HEW issued a regulation, on January 13, 1978, "to coordinate governmentwide enforcement of section 504." (45 C.F.R. Part 84). The regulation provides, *inter alia*, that each agency "shall issue a notice of proposed rulemaking no later than ninety (90) days after the effective date of this Part [January 13, 1978]", and "shall issue a final regulation no later than 135 days after the end of the period for comment on its proposed regulation." (45 C.F.R. Part 85.4(b)). This regulation also set forth prohibited discriminatory action against qualified handicapped persons, and provided for program access.

10. After HEW promulgated final guidelines and standards implementing Executive Order 11914, Congress amended section 504 in November 1978 to extend its nondiscrimination provisions to programs and activities conducted by Executive agencies and the United States Postal Service. The head of each Executive agency and the United States Postal Service was instructed to "promulgate such regulations as may be necessary to carry out the amendments" to section 504.

11. HEW began to develop a compliance guideline for public broadcasters in October 1979, but it had not com-

pleted the task prior to its split into separate departments of Health and Human Services and of Education in May 1980. *Gottfried v. FCC*, Slip opinion 17. At the time HEW was the agency responsible for section 504 — and thus at a time when its construction would have been due "substantial deference" from a reviewing court — HEW determined that section 504 applies to public broadcasting stations. *Gottfried v. FCC*, Slip Opinion 17.

12. On March 20, 1980, this court ordered HEW to issue a regulation by November 17, 1980 to assure that public broadcasting stations complied with section 504.

13. On May 4, 1980, the Department of Education was established and it assumed from HEW the responsibility for implementing and enforcing section 504. The HEW study group that was involved in preparation of section 504 compliance guidelines for public television was transferred to the Department of Education. *Gottfried v. FCC*, Slip Opinion 9, n.22. The Department of Education adopted the HEW guidelines and redesignated them as 28 C.F.R. part 41 (46 Fed.Reg. 40686).

14. By Executive Order No. 12250, dated November 2, 1980, responsibility for coordinating the implementation of section 504 was transferred to the Attorney General (45 Fed.Reg. 72995), but the general guidelines previously issued by HEW were retained.

15. On November 24, 1980, the Department of Education (ED) represented to this court that it had assumed responsibility for developing a compliance guideline for public broadcasters, but that it would be unable to meet the deadline previously set by the court for the promulgation of such a regulation. ED represented that it could and would issue such a regulation, in accordance with this court's order, by May 6, 1981.

16. On January 19, 1981, the Department of Education filed in the Federal Register a Notice of Intent to Develop Regulations applying section 504 to the activities of public broadcasters. (46 Fed.Reg. 4954). The notice was prepared, at least in part, to respond to the complaint filed in this action. The notice posed the following nine questions.

A. Should the Department pursue its intention to issue detailed regulations on the section 504 obligation of television broadcasters and systems of broadcasters? Are there other means of defining and insuring compliance with these obligations?

B. What is the nature and extent of the benefit derived by broadcasters from the availability of television programs produced with Department of Education funds?

C. What is the nature and extent of the benefit derived by systems of broadcasters such as the Public Broadcasting Service (PBS) and regional networks, from the availability of these programs?

D. Which activities carried out by broadcasters and systems of broadcasters are subject to the requirements of section 504 by virtue of the benefits referred to above? For example, would broadcasters and systems of broadcasters be required to make some or all programs that they broadcast or distribute accessible to persons with impaired hearing by reason of the availability of programs produced with Department funds? By what regulatory standards should any obligation to make programs accessible be determined?

E. What difference, if any, should there be in the Department's treatment of commercial and noncommercial broadcasters and systems of broadcasters? Why?

F. What are the advantages and disadvantages of using the various available methods of making television programs accessible to persons with impaired hearing? Currently

available methods include open caption, close captioned, and sign language interpreting. Commentors are invited to consider, with regard to these and other possible methods, such factors as the effectiveness in making programs accessible to the greatest possible number of hearing impaired persons, the degree to which the method adversely effects the video portions of the program, cost, availability of resources, such as captioning capacity or qualified interpreters, and anticipated technological developments. Are particular methods better suited for some programs than others?

G. Should the Department limit the methods which may be used? If so, which method or methods should the Department select, and why?

H. Should the Department differentiate between various types of programs in setting standards for program accessibility? Examples of such programs include: live programs, programs broadcast shortly after being recorded, programs intended only for local use, and programs recorded before a certain date. If so, what should be the basis for distinctions? Commentors are invited to consider such factors as technological feasibility, cost, availability of resources to provide access, and size of potential audience.

I. How soon after publication should any requirement for program accessibility take effect?

17. After issuing its notice, the Department of Education decided *not to develop* a general rule, applying section 504 to the activities of public broadcasters.

18. After the Attorney General assumed responsibility for coordinating implementation and enforcement of section 504 on November 2, 1980, nothing was done until July 1981, when the Deputy Assistant Attorney General for Civil Rights made inquiry as to the status of the regulation setting forth the obligation of public broadcasters pursuant to sec-

tion 504. The Deputy Assistant Attorney General for Civil Rights is currently planning to include a provision pertaining to the obligation of public television entities to the hearing impaired in a revised section 504 regulation. The Deputy Assistant Attorney General hopes to have a final regulation by June 1982. The Office of Management and Budget, however, has expressed the view that the Deputy Assistant Attorney General's date is optimistic.

19. Federal executive departments and agencies, as well as the Corporation for Public Broadcasting grant noncommercial educational television stations, public broadcasters, financial assistance. *Gottfried v. FCC*, Slip Opinion 13-14, n. 36.

THE COMMUNICATIONS ACT AND THE FEDERAL COMMUNICATIONS COMMISSION

20. The Communications Act of 1934 charges the Federal Communications Commission (FCC) with granting broadcast licenses and license renewals (47 U.S.C. §§ 307-309). The Commission does so pursuant to a general mandate to protect and advance "the public interest, convenience and necessity." (47 U.S.C. §§ 307(d), 309(a), 309(d)). Although this mandate is general, the Commission has in fact interpreted it through the issuance of a number of regulations and guidelines. Even before section 504 was enacted, the Commission recognized the appropriateness, and need, of making television accessible to the hearing impaired, more than a decade ago. (See, *Deaf Viewers — Use of TV to Inform*, 26 FCC 2d 917, 919 (1970)). The Commission there expressed concern about needs of the hearing impaired and noted that if stations do not voluntarily provide better service "it may be necessary to begin rule-

making looking toward the option of minimum requirements." *Gottfried v. FCC*, Slip Opinion 35, n. 70.

21. Both the courts and the FCC have construed the "public interest" standard for license award to include a requirement that broadcasters endeavor to discover and meet the programming needs of all significant groups within their areas of service. *Gottfried v. FCC*, Slip Opinion 6.

22. At least since 1970, the Commission has urged licensees to make efforts to serve the hearing impaired, a group estimated to include at least 13 million people, nationwide. *Gottfried v. FCC*, Slip Opinion 6.

23. The Commission has declined to include the hearing impaired among the groups whose needs must specifically be consulted. *Gottfried v. FCC*, Slip Opinion 6-7.

24. The Commission has never promulgated guidelines requiring entertainment programming, or other programming, for the hearing impaired. *Gottfried v. FCC*, Slip Opinion 7.

25. The Commission has emphasized in its public pronouncements that licensees can and will be responsive to the needs of the hearing impaired viewers, but has left the responsibility of how it can most effectively meet those needs to each licensee. *Gottfried v. FCC*, Slip Opinion 8-9.

26. Although the Commission has recognized that section 504 may impose a statutory obligation on public television stations to accommodate at least some of their programming to the needs of the hearing impaired, it has declined to take specific steps to enforce the Act. *Gottfried v. FCC*, Slip Opinion 9.

27. When the FCC grants a broadcast license it grants the free and exclusive use of a limited and valuable part of the public domain. When the licensee accepts that franchise,

it is burdened by enforceable public obligations. *CBS, Inc. v. FCC*, 101 S.Ct. 2813, 2829. The grant of a free license is functionally equivalent to "government subsidization of broadcasters." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 174, n. 5.

28. The Commmission has itself noted the value of the broadcast license it gives free of charge. In *Notice of Inquiry: Free Refunds and Future FCC Fees*, 69 FCC 2d 741, 768, the Commission stated:

> "The radio frequency spectrum is a scarce and valuable natural resource. Users of the spectrum must obtain a license from the Commission to operate, just as individuals and companies who wish to drill for oil and gas, mine coal, or graze cattle and sheep, must obtain permission from a federal agency before they can gain access to federal lands. Competitive bidding has been used in the leasing of offshore oil and gas rights in order to obtain a 'fair market value' for the use of that scarce resource. It is obvious that the spectrum is just as necessary to radio communications as crude oil is to gasoline production and land is to coal mining, cattle grazing and timber growing."
>
> (*Notice of Inquiry: Fee Refunds and Future FCC Fees*, 69 FCC 2d 741, 768).

29. The franchise given by the FCC to broadcasters for free constitutes federal financial assistance within the meaning of section 504 and the controlling HEW regulation. Federal financial assistance is defined as follows:

> " 'Federal financial assistance' means any grant, loan, contract . . . , or any other arrangement by which [Government] provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel; or (3) Real and personal property or any interest in or use of such property, including: (i) Transfers or leases of such property for less than

fair market value or for reduced consideration, and (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal government." (45 C.F.R. §§ 84.3(h) and 85.3(e)).

30. Broadcast licensees also receive through the FCC the services of federal personnel, free of charge. This constitutes federal financial assistance within the meaning of section 504. Congress, the courts, and the FCC have recognized that the Commission provides the kind of services for which it should charge fees. The Independent Offices Appropriations Act of 1972, Tit. 5, Stat. 290, 31 U.S.C. § 483(a) authorizes federal agencies to impose fees on all beneficiaries of "any work, service . . ., benefit, . . . license, . . . or similar thing of value or utility performed, furnished, provided, granted . . . by any federal agency." Congress' intent that the Act encompass many FCC activities is made clear in the Senate Report which led to the passage of the Act. It pointed out that the FCC "renders a tremendous variety of services, a substantial number of which would lend themselves to equitable fees." (S.Rep. No. 2120 at 4, 81st Cong., 2d Sess. (1950). The report listed a number of FCC services appropriate for fee assessment: "Radio station construction permits, radio station operating licenses and renewals, authorization of assignment of transfer of licenses, and certificates of public convenience and necessity." *FPC v. New England Power Co.*, 415 U.S. 345, 355 (opinion of Marshall, J.) (See, S.Rep. 2120, supra at 11).

31. The FCC suspended collecting all license fees on January 1, 1977. See *Notice of Inquiry: Fee Refunds and Future FCC Fees*, 69 FCC 2d 741 (1978) [hereafter *"First Notice: Fees"*]. It then initiated its inquiry into formulating a new fee schedule, *id.*, but has yet to promulgate a new

schedule, or revoke its suspension of fees. See, *Second Report and Order, Fee Refunds and Future Fees*, 73 FCC 2d 4 (1979); *Fee Suspension, Clarification*, 42 Fed.Reg. 3169 (January 17, 1977) ("Our intention was, and is, that until further notice, no fees are to be submitted to the Commission after January 1, 1977 — without exception."). The Commission recognizes that its failure to collect fees amounts to a subsidy: "Failure to recover all reimbursable costs is tantamount to forcing taxpayers to subsidize those firms and their customers who are engaged in the production, sale and consumption of telecommunication services. Such subsidies may not be legal, necessary, equitable, economically efficient or in the public interest." *First Notice: Fees, supra*, at 758. Still, the plain fact is that for over four years the FCC has not collected *any* "reimbursable costs", and the taxpayers have continued to subsidize the broadcast industry.

Because the FCC has donated its services for over four years, thereby subsidizing licensees, it has provided them federal financial assistance, and is required to issue section 504 regulations in accordance with Executive Order No. 11914 (41 Fed.Reg. 1787). Public broadcasters, as recipients of this subsidy, have obligations under section 504. See *CBS, Inc. v. FCC, supra*, 101 S.Ct. at 2829.

32. The Communications Act requires the FCC to make determination that the requirements of the "public interest" and the "public interest" standard must be construed to require at least some consideration of the national policy expressed by section 504. *Gottfried v. FCC*, Slip Opinion 13.

33. While the FCC is not the agency primarily responsible for enforcing section 504, nevertheless the FCC is obligated to further the national policy reflected in section 504 by appropriate rule or guideline. The FCC's "public

interest'' mandate must be construed to incorporate the national policy of nondiscrimination against the handicapped minority, at least insofar as that policy imposes specific legal obligations under section 504. *Gottfried v. FCC*, Slip Opinion 19.

34. By its passage of section 504, Congress placed public stations under a legal obligation to consider an attempt to serve the interests of the nation's hearing impaired minority. This policy falls well within the broad purposes of the Communications Act. The ''public interest'' standard established by the Communications Act imposes on the FCC an affirmative obligation to ensure that its licensees' programming fairly reflects the tastes of minority groups. *Gottfried v. FCC*, Slip Opinion 21.

35. In light of Congress' decision that recipients of federal financial assistance must extend their program to otherwise qualified members of handicapped minorities, the FCC must, at a minimum, weigh this Congressional policy in making ''public interest'' determinations. It is unreasonable to believe that a public station could give service cognizable as being ''in the public interest'' without at least making efforts to satisfy its statutory obligations. *Gottfried v. FCC*, Slip Opinion 21.

36. The FCC has itself recognized its obligation under the public interest standard to protect the interests of minority groups previously excluded from full access to broadcast programming. *Gottfried v. FCC*, Slip Opinion 22-23.

37. The task of weighing the interest of the hearing impaired is not an easy one. In pursuing the public policy represented by section 504 it is not the function of the FCC to adjudicate law violations. The Commission's responsibility is rather to effectuate the underlying national policy of providing federally assisted programs, including public

television, to handicapped persons, such as the deaf, who are capable of benefiting from them. *Gottfried v. FCC*, Slip Opinion 25-26.

38. There are many ways the FCC may implement section 504. The Commission has broad discretion, but it must do something to give meaning to that section. *Gottfried v. FCC*, Slip Opinion 28.

39. The FCC, in representations made to the United States Court of Appeals for the District of Columbia in *Gottfried v. FCC* stated that it is moving forward in the area of making television available to the hearing impaired, and that it will continue to do so. *Gottfried v. FCC*, Slip Opinion 35-36.

40. The FCC has an obligation to issue an appropriate regulation to make certain that television is made accessible to the nation's hearing impaired minority.

THE EVIDENCE AT TRIAL

41. In the absence of a government regulation specifically applicable to public broadcasters, the said public broadcasters take the position that they have *no* obligation to the deaf and hearing impaired under section 504, and the said public broadcasters assert that whatever they do to make public television accessible to the deaf and hearing impaired is done as a matter of grace, and not out of any legal obligation.

42. The only action taken by the government to make public television accessible to the deaf and hearing impaired consists of funding for "closed" captioning of programs funded by the Department of Education, and FCC authorization as broadcasters to transmit captioning for deaf and hearing impaired over Line 21 of the vertical blanking interval.

43. For deaf and hearing impaired to have access to "closed" captioning they are required to purchase an adapter which costs $250.

44. The deaf and hearing impaired, like handicapped persons generally, are at the low end of the economic spectrum. The $250 charge to obtain access to public broadcasting is prohibitive for most deaf and hearing impaired persons. To date, less than 40,000 adapters have been sold.

45. Closed captioning, at best, serves only a small percentage of the deaf and hearing impaired. There are 2 million "stone" deaf persons in the country. Additionally, there are between 5½ million, and 18 million hearing impaired persons who cannot hear television satisfactorily.

46. "Closed" captioning and "open" captioning cost the same amount to make. The total cost of "closed" captioning is greater than the cost of "open" captioning for the public broadcaster since open captioning does not require the special equipment necessary to transmit captioning on Line 21. Plainly, "open" captioning better serves the needs of the deaf and hearing impaired than "closed" captioning. The sole reason for having "closed" rather than "open" captioning is because the government believes that approximately 10% of persons who can hear are inconvenienced by "open" captioning.

47. The government does not require public broadcasters to program any particular amount of captioning — open or closed. That decision is left wholly to the public broadcaster. At the present time only a relatively small proportion of the programming on public broadcasting has any captioning. The program time containing open captioning is minimal.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331(a), 1343(4), 1337, 1361, and 5 U.S.C. §§ 702 and 704.

2. Marcella M. Meyer and Sue Gottfried are qualified handicapped persons within the meaning of section 504. Said plaintiffs are proper representatives of the class of persons who have a physical impairment, viz., which substantially limits a major life activity, to wit, hearing.

3. As a result of the government's failure to promulgate specific regulations implementing section 504, as applied to public broadcasting, plaintiffs, qualified handicapped persons, have, on the basis of handicap, been excluded from participation in, have been denied the benefits, of and have otherwise been subjected to discrimination under programs or activities which receive or benefit from federal financial assistance.

4. The federal government, in failing to issue regulations applicable to public broadcasting, has deliberately fostered and promoted, discrimination against deaf and hearing impaired persons seeking access to programs broadcast over public broadcasting facilities. The federal government has perpetuated discrimination against the deaf and hearing impaired by providing significant assistance to public broadcasters that deny the deaf and hearing impaired the opportunity to participate in or benefit from public broadcasting, and deny to the deaf and hearing impaired television broadcasting that is not equal to or as effective as that provided to others. The action and inaction of the federal government has resulted in the denial to the deaf and hearing impaired of the enjoyment of rights, privileges, advantages, and opportunities enjoyed by those who are not hearing impaired.

5. The public policy of the United States reflected in the Constitution and laws of the United States forbids discrimination against any person because of handicap. The avowed goal of section 504 is to open a new world of equal opportunity for more than 35 million handicapped persons, including the deaf and hearing impaired. Congress expressly found the following:

> "It is of critical importance to the nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps." (Tit. III of Pub.L. 93-516, December 7, 1974, 88 Stat. 1631, 1634; see, "Historical Note" under 29 U.S.C. § 701).

6. In the same "Historical Note" Congress found that the "benefits and fundamental rights of this society are often denied those individuals with mental and physical handicaps." The handicapped, and particularly the deaf and hearing impaired have a "discrete and insular" character. They have been subjected to a "history of purposeful unequal treatment"; relegated to "a position of political powerlessness"; and possess "imutable characteristics" linked to a history of prejudice. They have been subjected to discriminatory practices in the exercise of fundamental rights, including the right to vote, to serve as jurors, to work, to raise children, and other opportunities afforded to the non-handicapped. The stigma of inferiority has been placed upon them, and they have been segregated in programs and in institutions, continually removed from the mainstream of society. The handicapped qualify as a suspect class, entitled to maximum judicial protection. See, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28, (1973); *United States v. Carolene Products*, 304 U.S. 144, 152, n. 4 (1938).

7. The denial to the deaf and hearing impaired of access to public television not only denies that group due process of law, and equal protection of the laws, but also denies them rights secured by the First Amendemtn. Cf. *NAACP v. FPC*, 520 F.2d 432, 442 (D.C. Cir. 1975), *aff'd NAACP v. FPC*, 425 U.S. 662 (1976). A group denied meaningful access to television is without the information necessary to participate in our democracy as informed citizens.

8. Section 504 of the Rehabilitation Act applies to public broadcasters, who receive federal financial assistance from the Federal Communications Commission, the Departments of Education and Health and Human Services, and other federal agencies.

9. The responsible government agencies, including the Federal Communications Commission, the Department of Justice, and the Department of Education have delayed unreasonably in issuing regulations implementing section 504 as that statute applies to public broadcasting. This delay is exacerbated by the government's shifts in rulemaking responsibility applicable to public television, seemingly to avoid determination of compliance guidelines for programming for the deaf. This action by the government is tantamount to intentional discrimination against the deaf.

10. Since the responsible federal agencies have failed to promulgte any regulation to prevent discrimination against the deaf, it does not appear significant whether the government's action is measured by the label of "suspect classificaton", "middle-tier", or "rational" analysis. The failure to promulgate any regulation implementing section 504 as it applies to public broadcasting is simply irrational in light of the avowed national policy and command to all federal agencies empowered to grant federal financial assistance to take action to enable qualified handicapped persons to achieve their full capability, foster their self-

sufficiency and independence, and integrate them into the community. Practical difficulties cannot justify discrimination. "It is enough that the discrimination shown was palpably unjust and forbidden by the Act." *Mitchell v. United States*, 313 U.S. 80, 94 (1941); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *United States v. Carolene Products*, 304 U.S. 144, 152, n. 4 (1938).

11. The sweeping and arbitrary refusal by the government to promulgate any regulation providing for equal access to public television by the deaf and the hearing impaired denies plaintiffs rights secured to them by section 504 and denies them due process of law and the equal protection of the laws guaranteed by the Fifth Amendment to the United States Constitution, and denies them access to ideas and information necessary to excercise their rights as first class citizens in violation of the First Amendment to the United States Constitution.

12. Plaintiffs are entitled to an order requiring the federal defendants who are here charged with the responsibility of making grants and/or contracts with reference to public television which will be shown on any public television station enjoining them from making any grants or disbursing any monies for the preparation, or the grant of any monies to any public television station for the purpose of airing the programs that have been made with public monies, until the federal agencies have set forth either regulations or by contract have provided for full compliance with section 504 by public broadcasters receiving federal financial assistance.

13. On the basis of the evidence in this case, closed captioning is not a reasonable alternative for deaf people to have access to television.

14. Plaintiffs, as the prevailing parties against the federal defendants, are entitled to reasonable attorney's fees and costs in accordance with Section 505(a) and (b) of the Rehabilitation Act of 1973 (29 U.S.C. §794a (a) and (b); 28 U.S.C. §2412(d)(1)(A)); Equal Access to Justice Act, Pub.L. 96-481, §204(a), 94 Stat. 2327 (1980); 5 U.S.C. §504(b)(1)(A).

15. Any finding of fact made herein which is more properly deemed to be a conclusion of law shall be deemed a conclusion of law, and any conclusion of law made herein which may be more properly deemed a finding of fact shall be deemed a finding of fact.

Let judgment enter accordingly.

DATED: November 17, 1981

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:
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